No. 91-6516-CFX
Status: GRANTED

Title: Edward Soldal, et ux., Petitioners
v.
Cook County, Illinois

Docketed:
November 23, 1991

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Stainthorp,John

Counsel for respondent: Gillis,Kenneth L.

Entry	Date	Note	Proceedings and Orders
1	Nov 23 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 2 1992		DISTRIBUTED. January 17, 1992
4	Jan 13 1992	P	Response requested -- JPS. (Due February 13, 1992)
5	Feb 11 1992		Brief of respondent Cook County in opposition filed.
6	Feb 13 1992		REDISTRIBUTED. February 28, 1992
8	Mar 2 1992		REDISTRIBUTED. March 6, 1992
10	Mar 9 1992		Petition GRANTED.
			**********
11	Mar 19 1992		Record filed.
		*	Partial proceedings and briefs United States Court of Appeals for the Seventh Circuit.
12	Mar 27 1992		Record filed.
		*	Record proceedings United States District Court, Northern District of Illinois.
14	Apr 14 1992		Order extending time to file brief of petitioner on the merits until May 8, 1992.
15	May 8 1992		Brief amici curiae of ACLU, et al. filed.
18	May 8 1992		Brief of petitioner Edward Soldad filed.
19	May 13 1992		Joint appendix filed.
17	May 20 1992		Order extending time to file brief of respondent on the merits until June 23, 1992.
20	Jun 23 1992		Brief amici curiae of National League of Cities, et al. filed.
21	Jun 23 1992		Brief of respondents Cook County et. al. filed.
22	Jul 14 1992		CIRCULATED.
23	Jul 21 1992		SET FOR ARGUMENT MONDAY, OCTOBER 5, 1992. (3RD CASE).
24	Jul 27 1992	X	Reply brief of petitioner Edward Soldad filed.
25	Oct 5 1992		ARGUED.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

No. _____

EDWARD SOLDAL, et al.,

Plaintiff-Petitioner,

vs.

COUNTY OF COOK, et al.,

Defendant-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Whether deputy sheriffs who participated in unreasonably seizing the plaintiffs' home are liable in a civil action for violation of the plaintiffs' Fourth Amendment rights?

2. Whether deputy sheriffs who participated in extensively damaging the plaintiffs' home are liable in a civil action for violation of the plaintiffs' Fourteenth Amendment right to substantive due process?

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STATEMENTS UNDER RULE 21

Rule 21(b) The parties to the proceeding in the court below were Edward and Mary Soldal and their children Jimmy, Alena, Joseph and Jessie; Cook County Deputy sheriffs Chief Wittsman, Captain Jackson, Captain Levy, Lieutenant Jones, Officer Haritos, Officer Hunt, Officer Vaid, Officer Doe and Officer Poe; Jeffrey Peterson, Margaret Hale, Margaret Celeski and Kimberly Giovanni.

Rule 21(d) The en banc decision of the Court of Appeals is reported at 942 F.2d 1073. The panel decision of the Court of Appeals is reported at 923 F.2d 1241. The decision of the District Court is unreported.

Rule 21(e) Jurisdiction of this court is invoked pursuant to this Court's power to review a final decision of a United States Court of Appeals.

(i) and (ii) The en banc decision of the Court of Appeals was dated August 27, 1991. The panel decision of the Court of Appeals was dated January 24, 1991.

(iv) Jurisdiction is conferred on this court by 28 U.S.C. §1254.

(f)(i) Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

(ii) 42 U.S.C. §1983 (1981):

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

No. _____

EDWARD SOLDAL, et al.,

Plaintiff-Petitioner,

vs.

COUNTY OF COOK, et al.,

Defendant-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a civil action brought pursuant to the Civil Rights Act, 42 U.S.C. §1983, and state law by plaintiffs Edward and Mary Soldal and their minor children Jimmy, Alena, Joseph and Jessie. The ten count complaint[1] alleged that Cook County deputy sheriffs

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[1]The various counts of the complaint were as follows:

1. 42 U.S.C. §1983 claim re: September 4, 1987 seizure of plaintiffs' home and destruction of and damage to their property;

2. 42 U.S.C. §1983 claim re: September 5, 1987 arrest of Edward Soldal;

3. 42 U.S.C. §1983 claim re: October 11, 1987 arrest of Edward Soldal;

4. 42 U.S.C. §1983 policy claim against the County of Cook.

and private parties violated the plaintiffs' constitutional and state law rights by seizing and removing their trailer home from a mobile home park, destroying and damaging their property, and arresting plaintiff Edward Soldal on two separate occasions. This petition for certiorari addresses only Count I of the complaint - the 42 U.S.C. §1983 action for seizure of plaintiffs' home.

In the District Court defendant deputy sheriffs and two individuals moved for summary judgment on the grounds, inter alia, that the private parties, not the deputy sheriffs, seized and removed the plaintiffs' home, and that the facts did not support a finding of conspiracy or joint action between the private citizens and the deputy sheriffs. Therefore, these defendants argued, the seizure of the home was not state action and §1983 was inapplicable. (R.38)[2] The district court accepted this argument, granted the motion, and entered judgment in favor of all defendants on all counts. (R.67, Appendix C)

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5. Pendent state claim re: September 5, 1987 arrest and imprisonment.

6. Pendent state claim re: October 11, 1987 arrest and imprisonment.

7. Pendent state malicious prosecution claims arising out of September 5, and October 11, 1987 arrests.

8. Pendent state claim for intentional infliction of emotional distress.

9. Pendent state conspiracy claim.

10. Pendent state respondeat superior claim against Cook County.

[2]References denoted "R._" are to the docket sheet.

Plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit, arguing that the facts did show sufficient joint action to sustain the §1983 claim. The panel opinion (923 F.2d 1242 (7th Cir. 1991)) accepted plaintiffs' argument on this issue, but the majority held that this aspect of the plaintiffs' complaint should nevertheless be dismissed because the seizure of the plaintiffs' home did not violate any of their constitutional rights.[3] In dissent, Judge Flaum argued that plaintiffs' complaint and evidence set forth violations of both their Fourth Amendment right to be free from unreasonable seizures and their Fourteenth Amendment right to substantive due process.

Plaintiffs sought rehearing and the Court vacated the panel decision and granted rehearing en banc. (931 F.2d 445) The case was reargued and in a 6-5 decision the court reaffirmed the panel decision, elaborated on its holding that there was no Fourth Amendment violation, and reinstated the panel opinion in all other respects. 942 F.2d 1073 (7th Cir. 1991) In dissent, Judge Flaum, writing for the five member minority, argued that plaintiffs had set forth a Fourth Amendment violation and the case should be remanded to the District Court for trial.[4]

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[3]The court reversed and remanded other aspects of plaintiff Edward Soldal's claims which are not at issue here.

[4]Judge Flaum also persisted in his position that the plaintiffs had set forth a Fourteenth Amendment substantive due process claim "but the original panel majority chose not to address it." 942 F.2d at 1088 n.7

FACTS[5]

In March, 1985 plaintiffs Edward and Mary Soldal moved to Willoway Terrace mobile home park in Elk Grove Village, Illinois, where they lived in a mobile home they owned, together with their children, plaintiffs Jimmy, Alena and, after their birth in 1986, Joseph and Jessie. In May, 1987 defendants Terrace Properties Inc., the owner of Willoway Terrace, and Margaret Hale, the manager of Willoway Terrace, filed an eviction proceeding against the plaintiffs in the Circuit Court of Cook County seeking to evict plaintiffs from their plot. This suit was dismissed on June 2, 1987. (R. 56, Attachment A) Under Illinois law a tenant of a mobile home park has the right to renew his lease unless the park owner proves specific grounds for non-renewal, "such as violation of park rules, health and safety code or irregular or non-payment of rent." Ill. Rev. Stat. Ch. 80 §208

In August, 1987 Terrace Properties Inc. and Hale filed another eviction proceeding against the plaintiffs seeking possession of their lot but claiming no unpaid rent. The case was set for trial on September 22, 1987. (R.56, Attachment B) On September 4, 1987, Terrace Properties Inc. and Hale contacted the Cook County Sheriff's Department and informed the department that they were about to physically evict a tenant, the Soldals, and requested the presence of Cook County Sheriff deputies because they expected that

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[5]Since this case is on appeal from the grant of summary judgment the facts are taken from the affidavits and papers before the District Court with all factual inferences taken against the moving party and in favor of the opposing party. Adickes v. Kress and Co., 398 U.S. 144, 158-59 (1970)

the plaintiffs might try to resist the eviction. (R 56, Statement of Facts ¶ 7; R. 56, Attachment C) The Cook County Sheriff's Department agreed to send deputy sheriffs to the mobile home park to ensure that the moving of the mobile home was accomplished without any incidents. (R. 56, Statement of Facts ¶ 9; R. 56, Attachment C)

At about 1:00 p.m. on September 4, 1987 two employees of defendant Terrace Properties Inc. (hereafter called Willoway employees) arrived at the plaintiffs' home with their tools and Cook County deputy Sheriff Shawn O'Neill.[6] (R.56, Statement of Facts ¶ 10; R. 56, Attachment C; R. 56, Attachment E, p. 12-15). Deputy O'Neill had been ordered to the scene by Cook County Sheriff's Captain Jackson pursuant to the request from Terrace Properties Inc. and Hale for assistance in evicting the plaintiffs. (R.56, Attachment C) Deputy Sheriff O'Neill parked his car in the street outside the mobile home while the Willoway employees began pounding on the trailer (R.56, Attachment E, p. 13) and "started to tear our place apart. . .Yanking the sewer box, the water box off the side of the trailer." (R.56, Attachment E, p. 15)

When Edward Soldal asked the Willoway employees "What are you doing?" one employee "said to ask the sheriff deputy" and continued "ripping our trailer apart." (R.56, Attachment E, p. 16) Mr.

[6]The name of deputy sheriff O'Neill was discovered by plaintiff pursuant to discovery materials received from defendants Terrace Properties Inc. and Hale. At the time the case was dismissed as to all defendants there was a pending Motion to Amend the complaint to add O'Neill as a defendant, in place of Officer Doe. (R.46) The District court ruled that this motion was moot. (R.67)

Soldal turned around and found that deputy sheriff O'Neill had exited his car and was standing behind him. Mr. Soldal asked him "What are you going to do about this?" and O'Neill replied that "he was there to see that I didn't interfere with Willoway's workers." (R.56, Attachment E, p. 17-18) Mr. Soldal then asked "Are you just going to stand there while they destroy our home?" and the deputy answered "I'm just doing what the chief told me." (R.56, Attachment E, p. 17-18)

At the time he made these statements deputy sheriff O'Neill knew that the eviction was unlawful. (R.56, Attachment C) Mr. Soldal then took photographs of the Willoway employees taking the trailer apart while deputy O'Neill stood there, and then took a photograph of O'Neill's squad car. When he did this O'Neill threatened to sue him. (R.56, Attachment E, p. 19) Mr. Soldal then attempted to telephone his lawyer, but as the phone rang the line went dead, because it was cut. He then left his home and called from a pay phone. His lawyer contacted the sheriff's department and spoke to defendants Cook County sheriffs Chief Wittsman and Captain Levy who both claimed that the department was unaware that any deputy sheriffs were at the mobile home park. (R.56, Attachment E, p. 24) Wittsman and Levy's statements were false. (R.56, Attachment C)

Mr. Soldal then received a phone call from either Wittsman or Levy who again falsely stated that no deputy sheriffs were at the park, (R.56, Attachment E, p. 24-25), and subsequently talked again to his lawyer who told him that Levy, Wittsman and another deputy

sheriff had said they were going to put a stop to the eviction. (R.56, Attachment E, p. 25-26)

But when Mr. Soldal returned to his home he found that the Willoway employees, in the presence of deputy sheriff O'Neill, "had torn (the mobile home) almost completely apart. And they had hooked a tractor to it and was trying to yank it out of its spot. They had torn all the skirting off; they had torn down the canopy." (R.56, Attachment E, p. 26-28) Mr. Soldal then left to call his lawyer again. She made more calls to the sheriff's department and then advised Mr. Soldal to return to the trailer park and sign a complaint against Terrace Properties Inc. for criminal damage to property. (R.56, Attachment E, p. 35-37)

When Mr. Soldal returned to his home he found two more sheriffs in the area in addition to O'Neill.[7] (R.56, Attachment E, p. 38) He said he wished to file a complaint and one of the deputies, probably defendant Cook County Sheriff's deputy Hunt, told him to go see defendant Cook County deputy sheriff Lieutenant Jones who was at the Willoway office. (R.56, Attachment E, p. 38-39, 84-86) Mr. Soldal went into the Willoway office and found Lieutenant Jones meeting together with Hale and employees of Willoway. Lieutenant Jones directed Mr. Soldal to wait outside (R.56, Attachment E, p. 40-41), while he remained inside the office with Hale and the employees of Willoway for a further 20 to 30 minutes with the blinds on the office windows drawn shut. (R.56,

[7]Because of a discovery stay ordered by the District Court and the failure of the deputy sheriffs to answer discovery prior to the stay plaintiffs do not know the names of these officers.

Attachment E, p. 42)

When Jones eventually emerged from the office Mr. Soldal told him he wished to sign a complaint against Willoway. Jones said he had to talk to a district attorney and went back into the Willoway office for an additional thirty minutes. (R.56, Attachment E, p. 45) When he came out again Jones refused to allow Mr. Soldal to sign a complaint and told him that "it was between the landlord and tenant; that they were going to go ahead and continue to move out the trailer." (R.56, Attachment E, p. 46)

Mr. Soldal returned to his home and found it had suffered further serious damage. By now there were four deputy sheriffs at the scene. (R.56, Attachment E, p. 51-54) Eventually the Willoway workers managed to pull the plaintiffs' home loose and towed it onto the street. (R.56, Attachment E, p. 55-56) Mr. Soldal returned to the Willoway office where he saw Jones talking to Hale. When Jones saw Mr. Soldal he stopped talking to Hale and told him that "they were working on where they were going to put the trailer," and when Soldal said they needed the trailer for a place to sleep Jones said "they were going to set us up at the YMCA -- he thought that they were going to be setting us up at the YMCA." (R.56, Attachment E, p. 56-57) When an employee of Willoway stated that the trailer was to be put on the street Jones told him he could not do that. (R.56, Attachment E, p. 58)

Mr. Soldal then returned to his home where two deputy sheriffs were still present (R.56, Attachment E, p. 67), then returned to the Willoway office where he saw Hale and Jones, who were again

talking together. (R.56, Attachment E., p. 68) Mr. Soldal asked Jones where his home was going to be and Jones stated "that they were going to move the trailer and work out some place to stay. He said, either the YMCA or a motel or something he said. . .He just said, you know, to get your children together and, you know, leave the park." (R.56, Attachment E, p. 69-70) Hale then looked at Jones and said "I'm going to tell him this in front of you, that he's not allowed to come back in the park," and Jones said to Mr. Soldal, "Now, you heard what she said." (R.56, Attachment E, p. 70-71) Jones then told Mr. Soldal that he would let him know where he would be staying, (R.56, Attachment E, p. 71), and later told him that deputy sheriff Hunt would escort the Soldals to a motel, and that his trailer would be at a construction company on Oakton and Busse. (R.56, Attachment E, p. 80, 91)

Deputy sheriff Hunt then instructed Mr. Soldal to follow him in his car, and drove 8 to 10 miles to a motel. Hunt went into the motel and asked if there were reservations for the Soldals. (R.56, Attachment E, p. 86-89) Mr. and Mrs. Soldal and their twin babies stayed at the motel that night, while their two older children stayed the night with friends at Willoway pursuant to an agreement with the friends whereby the Soldals were to pick up the children in the morning. (R.56, Attachment E, p. 93, 101)

That night Mr. Soldal attempted to file a complaint that his trailer had been taken and locked up by Willoway. Defendant deputy sheriff Vaid came to see Mr. Soldal, stated "You're the guy that had the trailer pulled out of Willoway today" and refused to let

Mr. Soldal file a complaint. (R.56, Attachment E, p. 128-135) Throughout the entire incident on September 4, 1987 Chief Wittsman, Captain Jackson, Captain Levy, Lieutenant Jones, Officer Hunt, Officer O'Neill and the unidentified deputy sheriffs knew that the plaintiffs had the legal right to remain at Willoway and knew that there was no order authorizing their eviction. (R.56, Attachment C; R.56, Attachment E, p. 25-26, 35-37)

On September 5, 1987 at approximately 8:00 a.m. Mr. Soldal returned to Willoway to pick up his children from his friends' house, pursuant to his prior agreement with those friends. On his way into the park he saw Hale. (R.56, Attachment E, p. 101) While Mr. Soldal was at his friends' house getting his children defendant deputy sheriff Haritos came to the door, said "You're not supposed to be here," arrested and handcuffed Mr. Soldal and told Mr. Soldal's children that their father was going to jail and they were going to a foster home. (R.56, Attachment E, p. 103-107) Shortly thereafter deputy sheriff Hunt arrived in a squad car with Hale, and Haritos went to talk to them while Mr. Soldal and his children were placed in a squad car. (R.56, Attachment E, p. 108-109)

Haritos then drove the squad car to the Willoway office and went into the office with Hunt and Hale, while Mr. Soldal was left, handcuffed, in the squad car with his two children, for about an hour. (R.56, Attachment E, p. 110-111) After an hour Hunt emerged from the office and said he was taking the children to the motel and Mr. Soldal to jail. (R.56, Attachment E, p. 112) Mr. Soldal was then taken to Maywood and jailed for about four hours.

On September 9, 1987 Judge Sophia H. Hall of the Circuit Court of Cook County found that Terrace Properties Inc. "without following the requirements of the forcible entry and detainer statute and without any other authority forcibly removed plaintiff's trailer from defendant's lot 24 on September 4, 1987, after disconnecting plaintiff's utilities" and entered an Order requiring Terrace Properties Inc. to return the plaintiffs' home to its original location. (R.56, Attachment D) Eventually, the home was returned, though in a badly damaged condition. Mr. Soldal attempted to file a criminal complaint based on the extensive damage to it but deputy sheriff Vaid refused to allow Mr. Soldal to file a complaint. (R.56, Attachment E, p. 136-137)

On October 11, 1987 Officer Vaid arrested Edward Soldal after defendant Jeffrey Peterson said he wanted to press criminal assault charges against him. (R.39, Edward Soldal deposition, p. 172) At the same time Vaid also arrested Mr. Soldal for alleged assaults on defendants Celeski and Giovanni.[8]

All criminal charges against Mr. Soldal were subsequently dismissed.

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[8]The Seventh Circuit reversed the District Court's dismissal of Edward Soldal's constitutional and state law false arrest and imprisonment claims for the September 5 and October 11 arrests. Plaintiffs do not seek review of that portion of the Seventh Circuit's order.

ARGUMENT

I. The Seventh Circuit's holding that the seizure of plaintiffs' home by deputy sheriffs did not violate plaintiffs' Fourth Amendment rights is an unprecedented limitation on the scope of the Fourth Amendment, fails to protect the right to be let alone in one's own home and the right to possess property, and is in conflict with numerous prior decisions of this Court.

The opinion of the en banc majority of the Court of Appeals breaks new ground in restricting the scope of the Fourth Amendment both as to the type of conduct regulated by the amendment and the class of persons entitled to its benefits. The majority's opinion excludes the Fourth Amendment from deprivations of property, affords no protection to the privacy right of solitude in one's home, and acknowledges that its decision grants the law abiding fewer Fourth Amendment rights than the criminal. This decision will substantially limit constitutional protections against lawless conduct by government agents and fails to reflect the special protection the Fourth Amendment has historically afforded the home. Because the decision adopts a view of the Fourth Amendment that is completely at odds with established precedent of this court and other Circuit Courts of Appeals it should be reviewed and reversed.

The en banc majority held that Fourth Amendment interests were not implicated by the seizure of the plaintiffs' home, and thus it was not necessary to take the next step and consider whether the seizure was reasonable. The opinion agreed that there was "at least in a literal sense, a 'seizure' of the home and its contents" 942 F.2d at 1076, and that this seizure could properly be laid at

the door of the deputy sheriffs because "the record...requires us...to assume that there was a conspiracy between the private and the public defendants." 942 F.2d at 1075 But the court held that this seizure by state actors did not violate the Fourth Amendment because the Soldals had state remedies which they did not use, 942 F.2d at 1075-76, "there was no invasion of the Soldals' privacy" 942 F.2d at 1077, "the Fourth Amendment does not provide a remedy for a pure deprivation of property rights" 942 F.2d at 1078, deprivation of property rights should be analyzed exclusively within a Fourteenth Amendment procedural due process framework, 942 F.2d at 1080, Fourth Amendment liberty concerns "will rarely be present outside of that (law enforcement) setting," 942 F.2d 1080, and "the law abiding have fewer rights under the Fourth Amendment than the criminal." 942 F.2d 1082. This decision fundamentally rewrites Fourth Amendment jurisprudence, contradicts numerous prior decisions of this court, and contains ominous implications for the protection of citizens from blatantly illegal conduct by state actors.

The Soldal's plight presents a classic case of where the Fourth Amendment would generally be expected to provide protections and relief against the outrageous misconduct by government agents which occurred here. Without the slightest hint of legality the plaintiffs were summarily deprived of their home, their family split up, and they were ordered to leave, and remain away from, property which it was legally theirs to occupy. They were the victims of lawless police conduct that, among other things,

disrupted their routine, invaded their property rights, and embarrassed them - the kinds of insecurity that the Fourth Amendment was intended to protect against. See R. Posner, *Rethinking the Fourth Amendment*, 1981 The Supreme Court Review 52. The en banc majority holds that the Fourth Amendment is not broad enough to provide relief for such lawlessness. As the five judge dissent eloquently points out, this holding is grievously wrong.

The sanctity of the home has long been considered a fundamental concern of the Fourth Amendment. "At the very core (of the Fourth Amendment) stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961) The very words of the Fourth Amendment command that the right of the people to be secure in their houses against unreasonable seizures shall not be violated.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home - a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their...houses shall not be violated." Payton v. New York, 445 U.S. 573, 589 (1979)

As the dissenting opinion noted:

> ..the right to privacy a home affords its residents, whether by sheltering their possessions or their persons from government interference, has always been at the core of the fourth amendment's protections. "[T]he Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,'" for it is the home that, more than any other location, "provide[s] the setting for those intimate activities that the Amendment is intended to shelter from government *interference or surveillance*." Oliver v. United States, 466 U.S. 170, 178-79 (1984)

(quoting Payton v. New York, 445 U.S. 573, 601 (1980) (emphasis supplied)

942 F.2d at 1083. Though the sanctity of the Soldal's home was grossly violated and the seizure interfered with the intimate activities of their lives, the majority opinion stripped them of their Fourth Amendment protection.

The majority opinion first asserted, without citation of authority, that because the Soldals had state law remedies the court should be less inclined to find a Fourth Amendment violation. This argument was decisively rejected in Monroe v. Pape, 365 U.S. 167, 183 (1961), and this court recently reiterated that:

> overlapping state remedies are generally irrelevant to the question of a cause of action under §1983. A plaintiff, for example, may bring a §1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the state's constitution or statutes, and despite the fact that there are common law remedies for trespass and conversion. Zinermon v. Burch, ___ U.S. ___, 110 S. Ct. 975, 982-83 (1990)

Moreover indexing constitutional rights to the existence of state remedies makes no sense unless the challenge is to the state remedies themselves. In the context of the Fourth Amendment the majority's holding would lead to different constitutional standards in different states. The teachings of this court have been that the Fourth Amendment applies uniformly to all the people in every state. Wolff v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1960) The existence of state remedies is therefore irrelevant in determining whether the Soldals' Fourth Amendment rights were violated.

The majority next noted that seizures held to have violated

the Fourth Amendment have usually been seizures made in the course of public law enforcement. This is not remarkable since state officers involved in seizures will often be law enforcement officers. But the old idea that the Fourth Amendment is limited to law enforcement activities, see Frank v. Maryland, 359 U.S. 360 (1959), Easton v. Price, 364 U.S. 263 (1960) has long been discarded. Camara v. Municipal Court, 387 U.S. 523, 530 (1966); Wyman v. James, 400 U.S. 309 (1970); Michigan v. Tyler, 436 U.S. 499 (1978); Marshall v. Barlow's Inc., 436 U.S. 307 (1978); New Jersey v. T.L.O., 469 U.S. 325 (1985); O'Connor v. Ortega, 480 U.S. 709 (1987); National Treasury Employees Union v. Von Raab, 482 U.S. 902 (1987); Skinner v. Railway Labor Exec. Assn., __ U.S. __, 109 S. Ct. 1402 (1989). The Seventh Circuit gave a nod to this precedent but showed particular hostility to the Soldal's claim because the sheriffs were not investigating them for any criminal misconduct.[1]

This Court has recognized that the protection of the fourth Amendment exists apart from a person being suspected of criminal behavior. Wyman v. James, 400 U.S. 309, 317 (1970); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) The values protected by the Fourth Amendment are violated every bit as much by a search or seizure for lay purposes as one undertaken in the course of law enforcement. It made no difference to the illicit harm suffered by

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[1]In fact, the deputies apparently claim that they did assist in the seizure as part of law enforcement since they were there to "keep the peace." Brief of Appellee Deputy Sheriffs before the Seventh Circuit, p.19.

the Soldals that the reason for seizing their home was the mere hostility of the private parties and the sheriffs rather than a seizure that occurred in the course of a criminal investigation.[16]

Only if the non-law enforcement context of this seizure is considered decisive can this case be distinguished from United States v. Place, 462 U.S. 696 (1983). In Place the court held that the Fourth Amendment applied to a seizure and detention of luggage for ninety minutes at an airport, noting that "a (warrantless) seizure of personal property is per se unreasonable within the meaning of the Fourth Amendment." 462 U.S. at 701 In determining whether the seizure was a permissible Terry type stop the court looked to the effect of the seizure and noted that it "intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." 462 U.S. at 708 It is surely self-evident that the harm suffered by Place was minuscule compared with the disruption of the Soldal's life caused by the seizure of their home. They were suddenly cut off from the comforts and privacy of their home, their everyday belongings were taken from them, they had to find someone to take care of their children in this sudden emergency, find another place to live, travel an extensive distance to get there, stop their activities of everyday life and try to put their lives back together. This intrusion on their life was far greater than the

[16]Commentators have noted that a criminal may suffer additional harm from a search or seizure in being punished for a crime. This harm, however, is not one against which the Fourth Amendment protects. See, e.g., Posner, *Rethinking the Fourth Amendment*, 1981 Supreme Court Review 5

hardship caused by the 90 minute detention of luggage in Place or the temporary detention of packages in U.S. mail which was analyzed as a potential Fourth Amendment seizure in United States v. Van Leeuwen, 397 U.S. 249 (1970).

The majority also held that the seizure of the Soldal's home did not violate their Fourth Amendment rights because it did not violate their privacy. The opinion asserted that seizure of the home, as opposed to searching it, "did not invade the private 'space,' for solitude or secrecy that the Fourth Amendment protects. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting)" 942 F.2d at 1077. In fact, as the dissent pointed out, the police did not just intrude upon the Soldal's privacy, they eliminated it. 942 F.2d 1082

The seizure of the Soldal's home infringed many of the privacy interests that have long been protected by the Fourth Amendment. Because of the seizure they had nowhere to retreat to, nowhere to shelter from public scrutiny, (see United States v. On Lee, 193 F.2d 306, 315-16 (dissenting opinion), quoted in Silver v. United States, 365 U.S. 505, 511), nowhere to be secluded and enjoy physical privacy (see R. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Supreme Court Review 175), their private papers and effects were taken from them, their mental tranquility and freedom of movement were ended (see R. Posner, *Rethinking the Fourth Amendment*, 1981 Supreme Court Review 31), they had to leave the place they called home and seek shelter elsewhere for themselves and their children. The effect of this

intrusion on the values protected by the Fourth Amendment - the "right to be let alone" Olmstead, 277 U.S. at 478 - was catastrophic, far more severe than the detention of luggage in Place, the inspections for housing code violations in Camara or the entry onto fire damaged property in Michigan v. Tyler. Though the seizure did not violate the Soldals interest in secrecy, in that the police did not examine their private effects, the Fourth Amendment protects both solitude and secrecy, and "a stronger argument can be made for extending greater protection to the right of privacy as solitude rather than as secrecy. See R. Posner, Economic Analysis of Law, 639 (3d ed. 1980)" Soldal at 1082 n. 2 (Judge Flaum, dissenting)

The majority opinion's next assertion - that the Fourth Amendment provides no remedy for pure deprivation of property rights - is contrary to several well established holdings of this Court. To use just one example, the plain view doctrine rests upon the recognition that a seizure occurring in the context of a search that does not violate Fourth Amendment privacy values must nevertheless be evaluated in light of Fourth Amendment reasonableness standards. See, e.g., Texas v. Brown, 460 U.S. 730, 738 n.4 (opinion of Rehnquist J.). In such a seizure the privacy concerns have been satisfied (if not, the search and seizure would violate the Fourth Amendment) so the seizure implicates pure property rights. Nevertheless, it must be analyzed under Fourth Amendment standards. "If an article is already in plain view, neither its observation nor its seizure would involve any invasion

of privacy. (citations omitted) A seizure of the article, however, would obviously invade the owner's possessory interest." Horton v. California, __ U.S. __, 110 S. Ct. 2301, 2306 (1990)

Moreover, in discussing seizures this Court has never required anything more than interference with possessory interests. United States v. Jacobsen, 466 U.S. 109 (1984) defined a Fourth Amendment search as "a meaningful interference with an individuals possessory interest" (466 U.S. at 113), with no requirement that the search also violate some right of privacy. In Jacobsen, no privacy concerns were implicated since the package had already been opened before the police seizure but the court nevertheless analyzed the seizure as a possible Fourth Amendment violation. In Texas v. Brown, 460 U.S. 730, 747 (1982) Justice Stevens, in a concurring opinion, noted that

> The (Fourth) Amendment protects two different interests of the citizen - the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter.

This was reiterated in Horton v. California, where the court defined a seizure as "depriv(ing) the individual of dominion over his or her person or property." __ U.S. __, 110 S. Ct. 2301 at 2306 (1990). See also Maryland v. Macon, 472 U.S. 463, 469 (1984)

The majority's cite to Hudson v. Palmer, 468 U.S. 516 (1984) does not help its argument. Hudson v. Palmer expressly accepted that seizure of property alone could be a Fourth Amendment violation, stating "Assuming that the Fourth Amendment protects against the destruction of property, in addition to its mere

seizure..." 468 U.S. at 528 n. 8, (emphasis added). There the court's rejection of the plaintiff's Fourth Amendment claims was based on its holding that prison inmates have neither privacy nor possessory rights under the Fourth Amendment in property in their jail cells. 468 U.S. at 527-28 n.8, 538, 542, 544-45 Here, on the other hand, it was unquestioned that the plaintiffs had plenary possessory rights to their home. The Soldals were free citizens, poor perhaps and lacking the political clout to secure assistance from the Cook County Sheriff's Department, but as entitled as anyone to enjoy the property that was legally theirs, and as entitled as anyone to have the courts protect those rights. The Seventh Circuit majority opinion denied that protection.

The majority opinion also asserts that this is really a procedural due process case and argues that under Graham v. Connor, 490 U.S. 386 (1989), the plaintiffs must bring their §1983 lawsuit as a procedural due process claim, even though that claim would undoubtedly fail. 942 F.2d at 1075 This is a wide reading of Graham unsupported by the language of the decision. Graham held that §1983 arrest claims should be judged under the Fourth Amendment, rather than the Fourteenth, and noted that specific provisions of the bill of rights, rather than substantive due process, should, where possible, support §1983 actions. 490 U.S. at 395 But this case is completely different. In Graham the issue was which of two different constitutional amendments should govern. Here, the majority acknowledges that the Soldals did not have a

procedural due process claim.[11]

Moreover, plaintiff's claim was not a procedural due process claim. The plaintiffs' injuries were not caused by the failure to provide the proper hearings but by the seizure of their home, a seizure that the defendants could not legally have accomplished even if they had used the correct procedures.[12] There has been no showing that a suit for dispossession would have succeeded, and it most assuredly could not have succeeded on September 4, since the eviction proceeding was not set for trial until September 22. Under the majority's analysis many Fourth Amendment violations could easily be re-cast as procedural due process cases. Thus, a warrantless arrest in, or search of, a home, with probable cause, has long been considered unreasonable and a Fourth Amendment violation. Yet the arrest or search is deficient because the correct procedure was not followed.

Underlying the majority's reasoning runs a sense that the Soldals were entitled to less protection because they were tenants and because their home was a trailer rather than a fixed structure. Yet even an overnight guest has a legitimate expectation of privacy that the Fourth Amendment will protect, Minnesota v. Olson, 495 U.S. ___, 495 U.S. ___, 110 S.Ct. 1684 (1990), and the type of construction of a home has never been relevant to Fourth Amendment

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[11]As the majority notes, the plaintiffs did not try to plead or prove a procedural due process claim. 942 F.2d 1075

[12]The original panel opinion asserted that the plaintiffs were behind in their rent. This assertion is inaccurate and has no valid basis in the record.

concerns.[13] The present case is conceptually no different than if a municipal housing officer took it upon himself to demolish a brick home lived in by a homeowner, asserting that it was in violation of building codes. If in fact it were, demolition would be possible, yet surely any court would treat the demolition as a violation of the homeowner's right to be secure in her home.

Also underlying the majority's reasoning is the judgment that property interests are entitled to little constitutional protection. This value judgment has never been accepted by this Court. The holding of a District Court case cited by the majority, McCormick v. First National Bank of Miami, 322 F.Supp. 604 (S.D. Fla. 1971), that 28 U.S.C. §1343(3) does not confer jurisdiction for deprivation of property rights, was decisively rejected that same year in Lynch v. Household Finance Corp., 405 U.S. 538 (1971). The court held:

> ...the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

405 U.S. at 552. This ringing endorsement of property rights is a

[13]"The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." William Pitt the Elder

far cry from the majority's parsimonious relegation of property rights to an unprovable cause of action.

Here, the police and private defendants worked together to violate the plaintiffs' rights, depriving them of the security of their house by an unreasonable seizure. The majority's suggestion that recognizing a Fourth Amendment cause of action will "trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts" 942 F.2d at 1077, reflects an astounding lack of appreciation of the harm the Soldals suffered and the magnitude of the defendants' misconduct. This was hardly "routine commercial litigation," and protection of a person's home has never before been considered trivial. Commercial litigation rarely features the forceful intervention of police officers, and when it does the intervention should be judged against constitutional standards. If the intervention was pursuant to an apparently valid law, warrant, or other judicial determination, then the intervention should be found reasonable and the Fourth Amendment claim dismissed. If there is no such authority for the seizure, and if the seizure was otherwise without justification, then the seizure was in fact unreasonable and should be held so under the Fourth Amendment. But the specter of a horde of Fourth Amendment commercial claims, clamoring at the castle gates for Soldal to be overturned so they can overrun the fortress, is a hoax.

The opinion is in conflict with a plethora of decisions of this Court, and with other courts of appeals. See, e.g., Autoworld

Specialty Cars Inc. v. U.S., 815 F.2d 385 (6th Cir. 1987) (seizure of cars displayed for sale analyzed under Fourth Amendment standard); U.S. v. Bagley, 772 F.2d 482 (9th Cir. 1985) ("towing the automobile to the police lot constituted a seizure within the meaning of the Fourth Amendment") Spect v. Jensen, 832 F.2d 1516 (10th Cir. 1987) (upholding Fourth Amendment liability against persons engaged in repossession of personal property); United States v. Allen, 644 F.2d 749 (9th Cir. 1980) (officer's announcement he intended to seize suitcase constituted Fourth Amendment seizure); United States v. Cagle, 849 F.2d 924 (5th Cir. 1988) (temporary detention of suitcase at airport causing it to miss flight was an unreasonable seizure under the Fourth Amendment).

As an en banc opinion the Seventh Circuit holding assumes special importance. Because the majority opinion sets the Fourth Amendment heading in a direction opposite to the decisions of this court and other courts of appeal certiorari should be granted and the case set down for plenary argument.

II. The damaging of plaintiffs' home violated their Fourteenth Amendment right to substantive due process.

The plaintiffs' complaint alleged (R. 1, para. 15, 31, 33), and their evidence tended to prove (R.56, Att. E, p. 22, 27, 52), that the deputy sheriffs partially destroyed their home. The plaintiffs asserted that this violated their rights under the Fourteenth Amendment to substantive due process. (R.1, para. 33) The panel opinion, however, failed to address this aspect of their claim, in effect denying it.

As Judge Flaum pointed out in his panel dissent, 923 F.2d 1251, the wanton destruction of the trailer amounted to an actionable deprivation under the substantive due process clause of the Fourteenth Amendment. The destruction of the plaintiffs' property would be wrongful whether or not the proper procedures for an eviction were used. Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975, 983 (1990). Thus, the claim was not for a violation of procedural, but rather substantive, due process.

Because the panel opinion unduly restricts the scope of the Fourteenth Amendment substantive due process protections the Court should grant certiorari on this issue.

CONCLUSION

For all of the above reasons, petitioner respectfully urges this Honorable Court to grant his Petition for a Writ of Certiorari as to both issues raised herein.

Respectfully submitted,

Dated: November 21, 1991

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APPENDIX

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A: En Banc decision of the United States Court of Appeals for the Seventh Circuit. 942 F.2d 1073

B: Panel Decision of the United States Court of Appeals for the Seventh Circuit. 923 F.2d 1241

C: Decision of the United States District Court

APPENDIX A

ES

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127 Mich.App. 482, 487,
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nkins, 141 Mich.App. at
at 229.

III.

-stated reasons, we RE-
ict court's November 25,

1988, order granting summary judgment in favor of defendant and REMAND this case for a full hearing on the disputed issues of material fact as to whether defendant's proffered reason for the disparate treatment accorded plaintiff were in fact pretexts for racial discrimination.

Edward SOLDAL, et al., Plaintiffs–Appellants,

v.

COUNTY OF COOK, et al., Defendants–Appellees.

No. 89–3631.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 14, 1990.

Decided Jan. 24, 1991.

Reheard En Banc June 11, 1991.

Decided Aug. 27, 1991.

Owners of mobile home brought suit under § 1983 against sheriff's deputies and employees of trailer park, alleging that disconnection of their trailer from utilities by employees and their towing of trailer off park premises, while being observed by sheriff's deputies, was a violation of their Fourth Amendment right against unlawful search and seizure. The United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., granted summary judgment in favor of deputies and employees and appeal was taken. A panel of the Court of Appeals, 923 F.2d 1241, affirmed in part, reversed in part, and remanded. Thereafter the Court of Appeals, 931 F.2d 445, granted petition for rehearing en banc and vacated earlier opinion. On rehearing the Court of Appeals, Posner, Circuit Judge, held that movement of trailer home from camp, without any effort to search it, did not constituted a "seizure" prohibited by the Fourth Amendment, and there was consequently no violation of constitutional right to support § 1983 action.

Affirmed in part, reversed in part and remanded.

Easterbrook, Circuit Judge, concurred and filed opinion.

Flaum, Circuit Judge, dissented and filed opinion, in which Bauer, Chief Judge, and Harlington Wood, Jr., Ripple and Kanne, Circuit Judges, joined.

1. Civil Rights ⇐198(8)

Action of private person in enforcing rights conferred on him by state law is not deemed state action, for purposes of bringing § 1983 suit. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐198(8)

Given state of record, action of employees of private trailer park, in disconnecting mobile home from utilities in sewer and towing it off premises, while sheriff deputies stood by to preclude owners from violently opposing eviction, was state action for purposes of bringing § 1983 claim; conspiracy between employees and police would be implied. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

3. Searches and Seizures ⇐13

Disconnection of mobile home from utilities, and towing of home off trailer park premises, did not constitute a "seizure" for purposes of owners' claim that their Fourth Amendment right against searches and seizures had been violated; purpose of activities was to simply evict tenant, and there had been no previous search for evidence of crime, in violation of owners' privacy rights. U.S.C.A. Const. Amend. 4; 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights ⇐131

Assuming that some "element" or "tincture" of Fourth Amendment seizure was present in the disconnecting of utilities from a mobile trailer home and towing it

off premises, accomplished by trailer park personnel under the observation of sheriff's deputies there to prevent violent opposition by owners, owners did not have a § 1983 claim; "gist" of owner's claim was simple wrongful eviction. U.S.C.A. Const. Amend. 4; 42 U.S.C.A. § 1983.

John L. Stainthorp (argued), Peoples Law Office, Chicago, Ill., for plaintiffs-appellants Edward Soldal and Mary Soldal, individually and as legal guardians.

Madeleine S. Murphy, Asst. State Atty., Randolph M. Johnston (argued), Office of State's Atty. of Cook County, Chicago, Ill., for defendants-appellees County of Cook, Lt. Jones, Officer Haritos, Officer Hunt, Officer Vaid, Captain Jackson, Captain Levy and Chief Wittsman.

Randolph M. Johnston, Office of State's Atty. of Cook County, Chicago, Ill., for defendants-appellees Officer Doe and Officer Poe.

Randolph M. Johnston, Office of State's Atty. of Cook County, Chicago, Ill., John C. Vojta, Vojta & Lagattuta, Schaumburg, Ill., for defendants-appellees Jeffrey Peterson, Kimberly Giovanni, and Margaret Celeski.

Randolph M. Johnston, Office of State's Atty. of Cook County, John J. George, Dennis J. Aukstik (argued), Robert T. Oleszkiewicz, Daley & George, Chicago, Ill., for defendants-appellees Margaret Hale and Terrace Properties.

Before BAUER, Chief Judge, and CUMMINGS, WOOD, Jr., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION and KANNE, Circuit Judges.

POSNER, Circuit Judge.

We granted rehearing en banc to consider the applicability of the Fourth Amendment, which forbids unreasonable searches and seizures, to the removal of a mobile home from a trailer park. The three-judge panel that first heard the appeal held by a divided vote that the removal was not within the scope of the Fourth Amendment. 923 F.2d 1241, 1249–50 (7th Cir.1991). The full court adheres to this conclusion but has decided to elaborate its grounds. This opinion supersedes the panel's discussion of the Fourth Amendment, but in all other respects the panel opinion is reinstated.

Edward Soldal lived with his wife and four children in a trailer home, which he owned, situated on a rented lot in a trailer park in Elk Grove, Illinois. The owner of the trailer park, Terrace Properties, decided to evict the Soldals, and sued in an Illinois state court for an eviction order. Two weeks *before* the court hearing, Terrace Properties decided to go ahead and evict the Soldals forcibly. Anticipating the possibility of resistance, Margaret Hale, the manager of the trailer park, notified the Cook County sheriff's office; and when two employees of Terrace Properties showed up at the Soldals' trailer home to remove it, they were accompanied by a Cook County deputy sheriff, who told Soldal that he was there to prevent him from interfering with the eviction. Other deputy sheriffs were also at the scene to ensure that the eviction proceeded without interruption. In removing the sewer and water boxes from the side of the trailer home, the employees damaged the home. When they finished disconnecting the home from the utilities, they towed it off the lot and out of the trailer park. The eviction violated Illinois law, because no court order authorizing it had yet been issued—none ever *was* issued.

[1] The Soldals' suit is against Terrace Properties and Mrs. Hale as well as against the deputy sheriffs, and is brought under 42 U.S.C. § 1983, which provides a civil remedy for the deprivation of federal rights by persons acting under color of state law. An initial problem in such a case, from a plaintiff's standpoint, is how to bring *private* defendants under the rubric of persons acting under color of *state* law, a category normally reserved for state and municipal employees. Had the private defendants in this case, Terrace Properties and Mrs. Hale, been acting pursuant to a court order when they had the trailer home removed, this might have made their action

state action. *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344, 1346 (7th Cir.1986); cf. *Edmonson v. Leesville Concrete Co.*, — U.S. —, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). But they were not; and the action of a private person in enforcing rights conferred on him by state law is not deemed state action. *Id.* 111 S.Ct. at 2083; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164–65, 98 S.Ct. 1729, 1737–38, 56 L.Ed.2d 185 (1978). Otherwise everything would be state action, since what law does not forbid it permits.

[2] As for the public defendants in this case—the deputy sheriffs (county police)—the mere presence of police at the scene of a private act (here, the eviction of the Soldals by Terrace's employees) *in which they do not participate* does not transform the private act into a public one. *Gramenos v. Jewel Cos.*, 797 F.2d 432, 435 (7th Cir.1986). But there was more here. The eviction was unlawful, and Soldal had a common law right to resist it forcibly, although his right was limited to using mild force. The deputy sheriffs prevented Soldal from exercising his right, and while this by itself may not have made them actual participants in the eviction, the condition of the record (the case was dismissed on summary judgment) requires us, as the panel opinion explained, to assume that there was a conspiracy between the private and the public defendants—that the deputy sheriffs joined Terrace Properties in a scheme to get rid of a pesky tenant, a troublemaker. 923 F.2d at 1247–48. If so, it is as if the deputy sheriffs themselves seized the trailer, disconnected it from the utilities, and towed it away. Equivalently it is as if they had deputized the private defendants to assist them. Thus, on the state of the record, we must regard *all* of the defendants as having acted under color of state law.

This frames the question that we granted rehearing en banc to decide: If police officers disconnect and tow away a trailer home, can their action be challenged under the Fourth Amendment as an unreasonable seizure? The question is of surprising novelty, and its implications for other forms of eviction and even perhaps for the repossession of automobiles and other personal property make it of potentially far-reaching practical significance. The history of the question in the courts can be recounted briefly. The question was left open in *Fuentes v. Shevin*, 407 U.S. 67, 96 n. 32, 92 S.Ct. 1983, 2002 n. 32, 32 L.Ed.2d 556 (1972). A glancing reference in *Tavarez v. O'Malley*, 826 F.2d 671, 678 (7th Cir.1987), expressed the skepticism of three members of this court. The Third Circuit gave a peremptory "no" in *Lebowitz v. Forbes Leasing & Finance Corp.*, 456 F.2d 979, 980 (3d Cir.1972). There is, as we shall see, a Tenth Circuit case that bears closely though not decisively on the issue. The district courts are divided on it. Compare *Dorsey v. Community Stores Corp.*, 346 F.Supp. 103 (E.D.Wis.1972) (3-judge panel), and *Laprease v. Raymours Furniture Co.*, 315 F.Supp. 716, 721–22 (N.D.N.Y.1970) (same), with *McCormick v. First National Bank*, 322 F.Supp. 604 (S.D.Fla.1971).

It is no accident that the question has not arisen more often. The straightforward way for a plaintiff to mount a challenge under section 1983 to an eviction or repossession or other deprivation of property is by claiming that he was deprived of his property without due process of law, as in the *Del's* case cited earlier and a host of other cases. The panel held that the Soldals had abandoned any such claim. 923 F.2d at 1248. They were prudent to do so. In the circumstances of this case they would have faced a distinctly uphill fight to establish it. The Supreme Court has held that the denial of procedural rights (here the rights that Illinois law grants tenants in eviction proceedings) as a result of the random and unauthorized acts of subordinate public officers (the deputy sheriffs in this case) is not actionable under section 1983 unless the plaintiff lacks adequate judicial remedies under state law. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); see also *Easter House v. Felder*, 910 F.2d 1387, 1396–97 (7th Cir.1990) (en

banc). Illinois law entitled the Soldals to sue Terrace Properties and Mrs. Hale for the damages caused by the illegal eviction. Ill.Rev.Stat. ch. 80, ¶ 221. The Soldals had an adequate remedy. They failed to use it.

The existence of adequate legal remedies for an illegal eviction such as occurred here—state remedies if they are adequate, a federal remedy under the due process clause if not—is pertinent to deciding whether the Fourth Amendment should be bent to provide the Soldals with still another remedy. Bent it would have to be, because the amendment was never intended to regulate garden-variety commercial disputes of the sort involved in this case. Why bend, when the Soldals had adequate alternatives?

[3] The Fourth Amendment regulates both "searches" and "seizures" and it will be helpful to distinguish between the two. Even though we are treating the employees of Terrace who did the actual disconnection and removal as if they had been police officers employed by the State of Illinois, we can hardly construe their conduct as a police *search*. The "officers" did not enter the Soldals' trailer home. They had no interest in what was in it. They were not conducting an investigation or seeking to make an arrest. There was, however, at least in a literal sense, a "seizure" of the home and its contents; and while most seizures that are challenged under the Fourth Amendment are incidental to a search, some are not. The most common seizure challenged under the amendment is an arrest, and it is actionable whether or not it is accompanied by a search.

With only a few exceptions, the seizures held to be forbidden by the Fourth Amendment have been seizures made in the course of public law enforcement—certainly arrests are of that character—rather than repossessions or other seizures made in the course of a dispute between two private parties, even if police officers were assisting the person doing the seizing to the extent of being coconspirators with him. A good example is *Autoworld Specialty Cars, Inc. v. United States*, 815 F.2d 385, 389 (6th Cir.1987), where law-enforcement officers removed vehicles from a dealer's showroom for use in evidence in a criminal prosecution against the dealer. It could indeed be argued on textual and historical grounds that despite its broad wording the Fourth Amendment has no proper application outside the law enforcement context. Not only the second clause of the Fourth Amendment—the clause that places limitations on warrants—but also the background against which the amendment was enacted indicates that the searches and seizures to which the amendment refers are those made for purposes of law enforcement, not those made in connection with private disputes over property rights. Cf. *Wyman v. Jones*, 400 U.S. 309, 317, 91 S.Ct. 381, 385, 27 L.Ed.2d 408 (1971).

But a constitutional provision need not be interpreted so narrowly as to disable it from reaching novel abuses of power. The Fourth Amendment, at least, has not been so interpreted. It has been held to regulate wiretapping and administrative searches, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), neither a practice with which the framers of the amendment were acquainted. Repossessions and evictions may be far from the core of the Fourth Amendment but we hesitate to suggest that they can never provide the setting for a violation of the amendment. In *Specht v. Jensen*, 832 F.2d 1516 (10th Cir.1987), remanded on unrelated grounds, 853 F.2d 805 (10th Cir. 1988) (en banc), a search of the plaintiff's home by a creditor accompanied by the police was held to violate the Fourth Amendment. We agree with that decision; and it is the closest case to ours. But there is a crucial difference. In *Specht* the conduct of the police invaded an interest that the Fourth Amendment unquestionably protects: the interest in the privacy of the home. (The court in *Specht* emphasized this point. 832 F.2d at 1520.) The invasion was no less extensive, intrusive, or injurious just because the police were assisting a creditor rather than enforcing criminal or other public law.

It might seem, though, that the removal of the trailer home in this case was a "seizure" on the same footing with the "search" of the home in *Specht*. Literally there was a "seizure" here, but to use a literal interpretation of a constitutional provision enacted two centuries ago to make every repossession and eviction with police assistance actionable under—of all things—the Fourth Amendment would both trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts. That trivializing, this shift, can be prevented by recognizing the difference between possessory and privacy interests.

The police did not enter Soldal's trailer home. They did not rummage among his possessions. They did not arrest him (that came later, and is dealt with in an unrelated part of the panel opinion). They did not invade the private "space," for solitude or secrecy, that the Fourth Amendment protects. *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). In that respect this case is like *Cardwell v. Lewis*, 417 U.S. 583, 591, 94 S.Ct. 2464, 2470, 41 L.Ed.2d 325 (1974) (plurality opinion), where "nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence. With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed." (Footnotes omitted.) The police did, of course, take Soldal's home away, and that was a grave deprivation. But it was a deprivation purely of property; there was no invasion of the Soldals' privacy.

Of course this conclusion depends on how broadly or narrowly we define "privacy." Any interference with solitude is an infringement of privacy in a perfectly good sense of the word; thus an unwanted telephone solicitation is an invasion of privacy. And the Supreme Court has often used "privacy" as a synonym for reproductive autonomy. But it would be odd to suggest that a telephone solicitation aimed at selling tickets to the policemen's ball, or a law regulating abortions, invades privacy in a sense *relevant to the Fourth Amendment*. That sense has to do, rather, with the interest in keeping at bay prying ears and prying eyes. It is not invaded by an eviction or repossession; it can be invaded by a search or other entry into the home incident to an eviction or repossession.

In modern law the interests in property and in (Fourth Amendment) privacy are protected by different constitutional provisions and by different bodies of constitutional doctrine. *Hudson v. Palmer*, 468 U.S. 517, 538–40, 104 S.Ct. 3194, 3206–07, 82 L.Ed.2d 393 (1984) (concurring opinion). It is true that the older cases, illustrated by *Olmstead*, often tied the protections of the Fourth Amendment to property concepts, such as trespass. The modern cases, however, well illustrated by *Katz*, which overruled *Olmstead*, refocus the amendment from property to privacy in accordance with Justice Brandeis's dissent in *Olmstead*. This leaves deprivations of property to be regulated by the due process clause (also the takings clause, but that is not involved in this appeal, for reasons explained in the panel opinion, 923 F.2d at 1248–49). We have already noted that in interpreting that clause the Supreme Court has held (with qualifications not relevant to our case) that a person who claims to have been deprived of his property by the state without due process of law must use the judicial remedies that the state has provided for such deprivations. That requirement would be nullified if the property owner could avoid it by recasting his suit as one under the Fourth Amendment rather than under the Fifth (or Fourteenth) Amendment. The elaborate jurisprudence of property deprivations under the due process clause that culminates in *Zinermon v. Burch* would turn out to be a point about pleading.

Hudson v. Palmer illustrates the distinction we are making between property and privacy. Prison guards searched the plain-

tiff's cell and seized items of his personal property. This was as much a seizure of property as the removal of the Soldals' trailer. Yet the Supreme Court held that the Fourth Amendment did not apply. It did not apply because, the majority opinion concludes (Justice O'Connor's concurrence is less definite on this point and she was the fifth vote, but she joined Chief Justice Burger's opinion, thus making it a majority opinion), prison inmates have no right of privacy. 468 U.S. at 526–28 and n. 8, 104 S.Ct. at 3200–01 and n. 8. Prison extinguishes that. It does not extinguish property rights, but the Fourth Amendment does not provide a remedy for a pure deprivation of property rights. The remedy in a proper Fourth Amendment case includes the value of any property rights impaired or destroyed—such impairment or destruction is an item of consequential damages in a suit for the violation of the constitutional right. *Taliferro v. Augle*, 757 F.2d 157, 161–62 (7th Cir.1985); *Specht v. Jensen*, *supra*, 832 F.2d at 1528; *B.C.R. Transport Co. v. Fontaine*, 727 F.2d 7, 12 (1st Cir. 1984); *Marrero v. City of Hialeah*, 625 F.2d 499, 514 (5th Cir.1980). But if the only rights impaired or destroyed are property rights, the case is not actionable under the Fourth Amendment in the first place.

The cases, it is true, distinguish between a "possessory" interest said to be protected against unreasonable "seizure" and a "privacy" interest protected against unreasonable "search." *United States v. Jacobsen*, 466 U.S. 109, 113 and n. 5, 104 S.Ct. 1652, 1656 and n. 5, 80 L.Ed.2d 85 (1984); *Segura v. United States*, 468 U.S. 796, 806, 104 S.Ct. 3380, 3386, 82 L.Ed.2d 599 (1984); *Maryland v. Macon*, 472 U.S. 463, 469, 105 S.Ct. 2778, 2782, 86 L.Ed.2d 370 (1985); *Arizona v. Hicks*, 480 U.S. 321, 324, 107 S.Ct. 1149, 1152, 94 L.Ed.2d 347 (1987); *Horton v. California*, — U.S. —, 110 S.Ct. 2301, 2306, 110 L.Ed.2d 112 (1990); see 1 Wayne R. LaFave, *Search and Seizures* § 2.1(a), at pp. 299–300 (2d ed. 1987). Justice Stevens, dissenting in *Hudson v. Palmer*, thought that such decisions required a different result in that case. 468 U.S. at 543–44, 104 S.Ct. at 3209. Obviously the majority disagreed. The path of reconciliation lies in recognizing that the privacy which the Fourth Amendment protects is the privacy not only of oneself and one's home, as we have thus far been assuming, but also, as the amendment states, of one's "effects." "Effects" are personal property, and are frequently affected with a privacy interest. Just as it is an impairment of privacy to seize one's person (that is, to arrest one), so it can be an impairment of privacy to seize one's personal property. Opening a letter is an obvious example, and it is no accident that the list of protections in the Fourth Amendment includes "papers" as well as persons, houses, and effects. The opening of a package, as in *Jacobsen*, is another example of how a seizure can invade privacy. But not every interference with exclusive dominion and control over one's property is a seizure in the relevant sense because not every such interference compromises privacy. Merely removing luggage from an airport conveyor belt and squeezing it has been held not to be a seizure. *United States v. Lovell*, 849 F.2d 910, 915–16 (5th Cir.1988); *United States v. Garcia*, 849 F.2d 917, 919 (5th Cir.1988); *United States v. Brown*, 884 F.2d 1309, 1311 (9th Cir.1989). See also *Arizona v. Hicks*, *supra*, 480 U.S. at 324, 107 S.Ct. at 1152; *United States v. Karo*, 468 U.S. 705, 712–13, 104 S.Ct. 3296, 3302, 82 L.Ed.2d 530 (1984). It is different if the police "secure" a residence, that is, take it over, without searching it, while awaiting the arrival of a search warrant. That is a palpable interference with privacy—the police are in the home, looking about—even though it is not a search; it is rightly classified as a Fourth Amendment seizure. *United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir.1989). The physical movement of the Soldals' home—the privacy of its interior uncompromised and unobserved—was not a seizure.

The distinction may seem a fine one. The Fourth Amendment abounds in fine distinctions, perhaps more than are necessary. *California v. Acevedo*, — U.S. —, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991). But the particular distinction that we have just elaborated (and that future

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cases will no doubt elaborate further) between a Fourth Amendment seizure and other types of interference with property is necessary not only if we are to make sense of *Hudson v. Palmer* but also if the Fourth Amendment is not to swallow the due process clause. If police tow an illegally parked car, without entering or even looking into it, it is a deprivation of property within the meaning of the due process clause, *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir.1982); *Saukstelis v. City of Chicago*, 932 F.2d 1171, 1172 (7th Cir.1991), but is it also a seizure under the Fourth Amendment?

The distinction we are drawing between property and privacy interests in one sense helps explain, and in another sense is thrown into question by, the "plain view" doctrine, that is, the doctrine that if police are lawfully on the premises they can seize contraband or evidence that is in their plain view even if they had gained admittance to the premises without a warrant and without probable cause to believe they would find anything; their presence might, for example, be lawful only because the owner had consented. *Horton v. California*, *supra*; *United States v. Cardona-Rivera*, 904 F.2d 1149, 1154–55 (7th Cir.1990); *United States v. Perry*, 815 F.2d 1100, 1105 (7th Cir.1987). There is no incremental invasion of privacy if something is seized that is in, as it were, lawful public view; the thing is no longer private; and the owner's property right is not a Fourth Amendment shield. This point is further illustrated by *GM Leasing Corp. v. United States*, 429 U.S. 338, 351–52, 97 S.Ct. 619, 628, 50 L.Ed.2d 530 (1977), which upheld the Internal Revenue Service's seizure without a warrant of the plaintiff's automobiles because it "took place on public streets, parking lots, or other open places, and did not involve any violation of privacy," but not the seizure of books and records since that "involved intrusion in the privacy of the [plaintiff's] offices." Of similar character are the "open field" cases, such as *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), and *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). And see *Autoworld Specialty Cars, Inc. v. United States*, *supra*, 815 F.2d at 388.

Yet in all these cases the seizure of items that were in the public view, while lawful, was treated as a *Fourth Amendment* seizure, so that it had to be pronounced reasonable (for example because it was consented to, or supported by probable cause, or it seized something that was in plain view) before it could be permitted. The reason, however, is that seizures made in the course of investigations by police or other law enforcement officers are almost always, as in the plain view cases, the culmination of searches. The police search in order to seize, and it is the search *and ensuing seizure* that the Fourth Amendment by its reference to "searches and seizures" seeks to regulate. Seizure means one thing when it is the outcome of a search; it may mean something else when it stands apart from a search or any other investigative activity. The Fourth Amendment may still nominally apply, but, precisely because there is no invasion of privacy, the usual rules do not apply.

There is another reason for distinguishing public law enforcement from other contexts in which seizures may occur, and that is the historical connection between the Fourth Amendment and liberty. The objection to an arrest is not only that it is an invasion of privacy, but also that it is a restriction of liberty. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968). Some property seizures are of this character as well, such as prolonged detention of an individual's luggage at an airport, which by preventing him from continuing on his way curtails his liberty. *United States v. Place*, 462 U.S. 696, 708–09, 103 S.Ct. 2637, 2645, 77 L.Ed.2d 110 (1983). In none of these cases is the court concerned with property rights as such, although in some of the cases property rights get mentioned in connection with the questionof standing to maintain a Fourth Amendment challenge, an issue since laid to rest by *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). Outside of the law enforcement area the Fourth Amendment

retains its force as a protection against searches, because they invade privacy. That is why we decline to confine the amendment to the law enforcement setting. But concerns of liberty will rarely be present outside of that setting and they are not in this case—which because it is a case of seizure, not search, does not involve an invasion of privacy either.

[4] Thus, *no* interest protected by the Fourth Amendment is involved, and this helps show that even if, despite what we have said, there is some element or tincture of a Fourth Amendment seizure, it cannot carry the day for the Soldals. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), establishes the principle that the dominant character of the conduct challenged in a section 1983 case determines the constitutional standard under which it is evaluated. The narrow holding of *Graham* is that when the gist of the challenged conduct is an arrest, the court should use the standards of the Fourth Amendment to adjudge its lawfulness even though the conduct could also be characterized as a deprivation of liberty. But the converse should also be true. If the gist of the challenged conduct is a repossession or eviction conventionally challenged under the due process clause as a deprivation, recharacterization as a Fourth Amendment seizure is barred. The suggestion that *Graham* stands for the proposition that all property disputes should so far as possible be stuffed into the Fourth Amendment strikes us as bizarre.

Mr. Soldal is neither an arrestee (so far as pertinent to this part of the case) nor a prison inmate, but the principles of *Graham v. Connor* and *Hudson v. Palmer* sweep broader than their facts or narrow holdings, and the need to carve the joint between the Fourth Amendment and the due process clause is as urgent in this case as in an arrest case or a prisoner case. The decisions require us to mesh the different provisions in or incorporated by the Fourteenth Amendment while preserving their separate domains—and thus to make the amendment coherent. *Hudson* tells us to do so by allocating the protection of privacy to the Fourth Amendment and the protection of property to the due process clauses of the Fifth and Fourteenth Amendments. *United States v. Janik*, 723 F.2d 537, 547–48 (7th Cir.1983); cf. *United States v. Karo*, *supra*, 468 U.S. at 713, 104 S.Ct. at 3302. Mr. Soldal lost his property, but not his privacy or his liberty. He has no Fourth Amendment case. He had other legal remedies but he waived them.

The paradox seemingly presented by our decision—that the law-abiding have fewer rights under the Fourth Amendment than the criminal—is superficial. Different constitutional provisions protect different interests. The Fourth Amendment protects privacy, and that interest is more likely to be infringed by criminal investigations than by other governmental activities—though the law-abiding are, occasionally, the inadvertent and, rarely, the intended targets of a criminal investigation, and when that happens they receive the full protection of the amendment. The due process clause of the Fifth and Fourteenth Amendments is among the provisions that protect property (though that is not all it protects); and property interests are more likely to be asserted by the law-abiding than by the criminal class. The Soldals, to repeat, had remedies; they chose the wrong one.

For the reasons stated in this and the panel opinion, the judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

EASTERBROOK, Circuit Judge, concurring.

One might think from reading the dissenting opinion that we have rejected *Entick v. Carrington*, [1765] 19 Howell's State Trials 1029. Yet everyone agrees that both privacy and possessory interests in a home are substantial and that the Soldals are entitled to damages if their allegations prove true. All the court's opinion, which I join, holds is that this dispute about premature eviction should be handled like other landlord-tenant disputes—in local housing court.

Dragooning such a case into federal court under the aegis of 42 U.S.C. § 1983 is lexically possible, for the fourth amendment is written broadly. When interpreting the Constitution it is tempting to see how far old texts can be pressed—for any limitations, any at all, create at least some possibility of horrible deeds slipping into the cracks. A sophisticated lawyer worried about abuses starts with the text and identifies its purposes and consequences. The fourth amendment protects both privacy and property—and of course property comprises many rights, including possession. Next comes a generalization in which the Constitution deals with whatever may threaten these interests to any degree. That move eliminates loopholes, but at the expense of making the fourth amendment so universal that it occupies the field of governmental action. Privacy and property interests just about exhaust the entitlements our legal system recognizes. As the fourth amendment bars unreasonable action, a reading taking the covered interests to the limits transfers to the federal judiciary the power to decide whether every public action is reasonable. What is left for the rest of the Constitution—or for state law and democratic choice?

If the fourth amendment indeed covers all governmental action interfering with possessory interests, the implications are startling. Public employees repairing a street negligently rupture a gas main, requiring the evacuation of a city block. That action invades a possessory interest, for it deprives the householders of the practical ability to use their homes. Negligence is never reasonable, and the fourth amendment establishes objective standards, under which the public employees' states of mind do not matter. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989); *Maryland v. Macon*, 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2782–83, 86 L.Ed.2d 370 (1985); *Scott v. United States*, 436 U.S. 128, 136–38, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978). Public utility companies will be surprised to learn that turning off the water or electricity poses not only a problem under the due process clause, which they may solve by offering their customers an opportunity to comment, *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), but also a problem under the fourth amendment, requiring *substantive* federal review of the "reasonableness" of the decision—for disconnecting utilities is the step said to prevent the Soldals from using their trailer and so violate the fourth amendment.

All the sheriffs' deputies did was stand by while the landlord's employees disconnected the trailer's utilities and removed it from their lot. If this is a "seizure" of any kind by the deputies, cf. *California v. Hodari D.*, — U.S. —, 111 S.Ct. 1547, 1550–51, 113 L.Ed.2d 690 (1991), it is problematic only because state law specifies that a court order precede eviction. Indeed, the only reason why the removal of the mobile home is said to be "unreasonable" is that it violated state law, and this whether or not the Soldals really were behind in their rent or disregarded some clause of the lease. Our case is another chapter in the saga of attempts to transmute state rules into constitutional ones. If the Soldals were right in thinking that there was a "seizure", the question would remain whether a federal norm, independent of state law, nonetheless deems their acts unreasonable. *Elkins v. United States*, 364 U.S. 206, 223–24, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry.... The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."). States could decide to allow landlords to engage in self-help and put the burden of initiating litigation on the tenant. If deputies may keep the peace during self-help in a state where tenants must start the legal proceedings, they may prevent violence during self-help in a state where landlords have (but disdain) the burden of initiation. Only state law distinguishes these cases, and the Constitution is unaffected by state law. It is hard to conceive

of the Soldals' invocation of the litigation-first rule established by Illinois law as a claim under the fourth amendment, so the suit was properly dismissed even if a seizure occurred. States may decide for themselves how extensive will be the remedies for gun-jumping.

FLAUM, Circuit Judge, with whom BAUER, Chief Judge, and HARLINGTON WOOD, Jr., RIPPLE and KANNE, Circuit Judges, join, dissenting.[1]

In its effort to develop a rationale for denying the Soldals' fourth amendment claim, the majority has produced a remarkable holding. The fourth amendment, it maintains, governs should police *intrude* upon your privacy by searching your home. Should they instead intentionally *eliminate* your privacy by participating in the carting away of your residence, the fourth amendment can have no bearing. With all due respect, I dissent.

The majority acknowledges that the police denied the Soldals the privacy of their home, but maintains that the fourth amendment is concerned only with intrusions of privacy as the right to secrecy rather than as the right to solitude. To be sure, there is a distinction between these aspects of privacy, but not one that should bar the applicability of the fourth amendment in the limited and unique circumstances of this case.[2] Along with the right to secret one's effects, or words, or actions, the right of privacy encompassed by the fourth amendment protects—in Justice Brandeis' words, dissenting in *Olmstead*—"the right to be let alone," giving the individual the right to isolate himself from unreasonable government intrusions. In my view, there are few infringements of privacy greater than denying the enjoyment of one's home. Arrests—in which police figuratively, and often literally, remove the individual from the home, in contrast to taking the home from the individual—involve the most comparable deprivation of privacy. An arrest gives police the right to search the individual, but the applicability of the fourth amendment's protections to police conduct during arrests does not turn on whether or not they conduct a search incident to the arrest, so the invasion of privacy must be inherent in the arrest itself. The majority acknowledges the invasion of privacy inherent in arrests, *ante* at 1078, but does not address *how* an arrest invades privacy in any sense other than as an interference with the arrestee's right to solitude.

The analogy between an arrest and the police involvement in the seizure of the Soldals' trailer is easily seen when we consider what happened to Edward Soldal the next day. When Mr. Soldal returned to the trailer park to retrieve two of his children (whom he had left with a neighbor for the night after he was evicted from the trailer park), police arrested him for trespassing. That seizure gave Mr. Soldal a fourth amendment claim, even though it was merely a continuation of the previous day's attempts to evict the Soldals from the trailer park. We all agree that Mr. Soldal has a valid fourth amendment claim because the arrest was made without probable cause to believe that he was a trespasser; why, then, does he not raise a valid fourth amendment claim with regard to the seizure of his home when police had no more basis for assisting in the eviction? Suppose that the police had been requested to usher Mr. Soldal and his family from the trailer park *before* their trailer was towed away. In that case, the Soldals would have a fourth amendment claim stemming from the forcible removal from the premises; why should they lose the claim when police first help to remove their home, giving them no choice but to leave?

I am not, of course, suggesting that the seizure of *any* private property is an in-

1. My dissent is directed toward only the Soldal's fourth amendment claim regarding the seizure of their trailer. As I indicated in my dissent to the panel opinion, I concur in the remand of Mr. Soldal's fourth amendment claims arising from the subsequent unlawful arrests.

2. To the extent that the fourth amendment affords different degrees of protection to these aspects of privacy, a stronger argument can be made for extending greater protection to the right of privacy as solitude rather than as secrecy. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 639 (3d ed. 1986).

fringement of privacy, for most property affords little privacy to persons as opposed to their effects. Indeed, the home appears *sui generis* in this important but limited regard. Taking a pen does not compromise the privacy of its owner's person, nor does seizing a container in which personal effects are stored. An automobile might, at one time, have been thought to afford privacy to its occupants (as well as to their possessions), but that era is past. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1979). By contrast, the right to privacy a home affords its residents, whether by sheltering their possessions or their persons from government interference, has always been at the core of the fourth amendment's protections. "[T]he Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,'" for it is the home that, more than any other location, "provide[s] the setting for those intimate activities that the Amendment is intended to shelter from government *interference or surveillance*." *Oliver v. United States*, 466 U.S. 170, 178–79, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (quoting *Payton v. New York*, 445 U.S. 573, 601, 100 S.Ct. 1371, 1387, 63 L.Ed.2d 639 (1980) (emphasis supplied)).

The majority's resort to *United States v. Lindsey*, 877 F.2d 777 (9th Cir.1989), puzzles me, as I conclude that the case clearly illustrates my point. The majority acknowledges that when, as in *Lindsey*, police secure a home without searching it, they violate the residents' fourth amendment rights. The Soldals allege that police violated their fourth amendment rights in almost exactly the fashion described in *Lindsey*—in both cases police action intruded upon the personal privacy of the occupants of the homes by eliminating their ability to isolate themselves within their residences—except that in this case instead of physically occupying the house, it is as if the police surrounded the exterior of the home and denied the residents access to it.[3] It seems to me that such an intrusion is every bit as "palpable" as the intrusion described in *Lindsey*.

In my judgment, the analogy to arrest leads to a broader, though no less telling, indictment of the majority's position. I respectfully suggest that the fourth amendment is not concerned exclusively with privacy. Indeed, the Court expressly rejected that view in *Katz v. United States*, the case the majority heralds as the confirmation that privacy alone is the fourth amendment's province. *See* 389 U.S. at 350, 88 S.Ct. at 510 ("[the Fourth Amendment] protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."). The analogy I draw between arrests and the seizure at issue in this case underscores the point. In the face of case law that states the proposition explicitly, the majority opinion recognizes that arrests implicate the fourth amendment not only because they invade privacy but also because they restrict liberty. *Ante* at 1080. Indeed, the opinion further observes that property seizures that infringe the property owner's liberty to go about his business implicate the fourth amendment as well. *Id. United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), makes that point, and it is an instructive case for this and other reasons.

In *Place*, police detained the luggage of a suspected narcotics trafficker for three days before they obtained a search warrant. The police took custody of the bags initially while they made arrangements to have a narcotics dog sniff them; after the

3. In my view the distinction is largely irrelevant to fourth amendment analysis. Securing a home is a seizure that intrudes upon the solitude of the residents whether accomplished by an entry into the home or by surrounding its perimeter. Similarly, both methods "interfere to the same extent with the possessory interests of the owners." *Segura v. United States*, 468 U.S. 796, 811, 104 S.Ct. 3380, 3389, 82 L.Ed.2d 599 (1984) (Burger, C.J., joined by O'Connor, J.). More on this in a moment. In any event, whether it constitutes an invasion of privacy as solitude, an interference with possession, or both, securing a home is actionable under the fourth amendment, and that is the point recognized by the court in *Lindsey*.

dog arrived and alerted to one of the bags some 90 minutes later, police retained the bags over the weekend until they could obtain a warrant from a magistrate on the following Monday morning. The Supreme Court held that although no search of the bags had occurred because the invasion of privacy entailed by the dog sniff was virtually nonexistent, 462 U.S. at 707, 103 S.Ct. at 2644, the bags had been unlawfully seized because the police had intruded "on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.* at 708, 103 S.Ct. at 2645.

I find the majority's nod to *Place*, *ante* at 1079, to be misplaced in light of the reasoning employed and the result reached by the Court in that case. If the detention of luggage for even 90 minutes was an unreasonable deprivation of liberty in *Place*, *see* 462 U.S. at 709–10, 103 S.Ct. at 2645–46, I cannot concur with the majority's view that there was *no* deprivation of the Soldals' liberty interests, reasonable or otherwise, when their home was illegally towed away. Place, whom the police had some reason to suspect of criminal activity, was inconvenienced by the loss of the clothing, personal effects, and, of course, the cocaine, his bags contained. The Soldals, whom police had no reason to suspect of any wrongdoing whatsoever, were deprived of the occupancy of their home. The members of the majority apparently believe that Place suffered a greater loss. I do not.

Perhaps even more distressing than the majority's conclusion that the police *did not* restrict the Soldals' liberty is its acknowledgement that the police *did* disrupt their possessory rights. The concession is disturbing, because the majority goes on to hold that the disruption is not actionable under the fourth amendment because it was not attended by any invasion of privacy. That position strikes me to be at odds with the myriad cases in which the Supreme Court has affirmed that the fourth amendment's proscription against unreasonable seizures shields the individual's *possessory* interest in the property seized—an interest altogether different than the individual's *privacy* interest in the property. The majority does not address the Court's statement in *Place* that the seizure violated the fourth amendment because it unreasonably infringed "the suspect's possessory interest in his luggage." 462 U.S. at 708, 103 S.Ct. at 2645. Nor does it heed cases like *Rakas v. Illinois*, in which the Court explicitly recognized that although a search of a home (and by extension, a car) does not violate any legitimate expectations of privacy of visitors in the home, those visitors could nonetheless "contest the lawfulness of the seizure of evidence ... if their own property were seized during the search." 439 U.S. 128, 142 n. 11, 99 S.Ct. 421, 430 n. 11, 58 L.Ed.2d 387 (1978). *See also United States v. Salvucci*, 448 U.S. 83, 91 n. 6, 100 S.Ct. 2547, 2552 n. 6, 65 L.Ed.2d 619 (1980) ("Legal possession of the seized good may be sufficient in some circumstances to entitle a defendant to seek the return of the seized property if the seizure, as opposed to the search, was illegal."); *United States v. Jackson*, 585 F.2d 653, 657 (4th Cir.1978) (defendant's ownership of a bag containing gambling receipts found in car belonging to another gave him standing to contest seizure of the bomb though not the search of the car) (citing *United States v. Lisk*, 522 F.2d 228, 230–31 (7th Cir.1975) (Stevens, J.), *cert. denied*, 423 U.S. 1078, 96 S.Ct. 865, 47 L.Ed.2d 89 (1976)). It devotes little attention to cases like *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (198[illegible] in which the Court held that by asserting control over a package that had already been opened and searched by private parties, federal agents "seized" the package for purposes of the fourth amendment even though the agents did not invade the privacy of the package's owner when they seized it. *Id.* at 120–21, 104 S.Ct. at 1660. *See also Autoworld Specialty Cars v. United States*, 815 F.2d 385, 389 (6th Cir.1987) (seizure by customs agents of automobiles displayed in public showroom subject to fourth amendment despite lack of invasion of privacy); *United States v. Bagley*, 772 F.2d 482, 490 (9th Cir.1985) (towing of lawfully parked car belonging to suspect who had not been

apprehended "constituted a seizure within the meaning of the fourth amendment"); *United States v. Roberts*, 644 F.2d 683, 688 (8th Cir.1980) (en banc) (seizure by police of marijuana discovered by private party in rental storage unit actionable under fourth amendment). The majority does suggest that *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), supports its view, but does not explain that although no search or seizure took place when police obtained paint scrapings from the car, a seizure did occur when the police towed the car away. *Id.* at 593, 94 S.Ct. at 2470. Another seizure occurred when police assisted in towing the Soldals' home away.

The Court's most recent affirmation, in 1990, of the fourth amendment's applicability when government officials interfere with possessory interests is, I submit, also its most plain. Consider the language of *Horton v. California*, — U.S. —, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990):

> The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. The "plain view" doctrine is often considered an exception to the general rule that warrantless searches are unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *A seizure of the article, however, would obviously invade the owner's possessory interest.*

110 S.Ct. at 2306 (footnotes and citations omitted; emphasis added). For that reason, the seizure at issue in *Horton* was subject to fourth amendment analysis. I see no way to square the Supreme Court's view that seizures, even in the absence of an invasion of privacy, implicate the fourth amendment, with the majority's view that they do not.

Unlike the majority, I do not read *Hudson v. Palmer* to have fundamentally altered this longstanding tenet of the Supreme Court's fourth amendment jurisprudence. In that case, prison authorities seized a ripped pillow case found in an inmate's cell during a "shakedown" search; the Court held that the prisoner did not have a cause of action under the fourth amendment. The majority says that *Palmer* shows the fourth amendment does not protect property interests because if it did the prisoner would have been able to invoke the fourth amendment to challenge the seizure of the pillowcase even if he were unable to challenge the search itself. *Palmer*'s result, however, was premised on the Court's conclusion that prison inmates have neither privacy *nor possessory* rights in property maintained in their jail cells. 468 U.S. at 527–28 & n. 8, 104 S.Ct. at 3200–01 & n. 8 (rejecting seizure claim "for the same reasons"); *id.* at 538, 104 S.Ct. at 3206 (O'Connor, J., concurring) ("The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects...."); *id.* at 542, 544–45, 104 S.Ct. at 3208, 3209–10 (Stevens, J., dissenting) (rejecting majority's position that prisoner's have no privacy or possessory interests in their property); *see also* W. LaFave, Search and Seizure §§ 2.4(d), 10.9(a) (2d ed. 1987). The Court's holding, then, was limited to the prison environment, making the case particularly unsuited to carry the burden heaped upon it by the majority.

Troubled as I am by the majority's interpretation of binding precedent, consider why, under the majority's approach, *any* seizure, whether made in the course of a law enforcement investigation or a civil property dispute, should be subject to the strictures of the fourth amendment. When police seize a suspect's personal effects after a search, the seizure does not implicate the suspect's right to privacy. As *Horton* and *Place* explain, and the majority apparently agrees, the invasion of privacy attends the search rather than the seizure. Why, then, does the majority treat a search as a prerequisite to a seizure under the fourth amendment? If the fourth amendment protects only privacy interests, it should not be employed to bar even those

seizures that have been preceded by a search since the seizure itself does not infringe privacy. The majority ties these two distinct concepts together because it assumes that a seizure is the object of the invasion of privacy—"police search in order to seize." *Ante* at 1079. That assumption, I believe, misconceives the investigatory process. Police search to uncover information (therein lies the invasion of privacy); they seize for other reasons, usually to gather evidence to present at trial (therein lies the disruption of possession). This case illustrates another, albeit objectionable, reason police might seize private property. In neither case are seizures a necessary incident of a successful search—police can present evidence of the results of a search or investigation by means of their own testimony. *Cf. United States v. Jacobsen*, 466 U.S. 109, 119, 104 S.Ct. 1652, 1659, 80 L.Ed.2d 85 (1984). The fourth amendment governs seizures, but not, as the majority asserts, because they are inextricably bound up with searches.[4] The reason is simply that the plain language of the fourth amendment guarantees the right to be secure against both "unreasonable searches *and* seizures."

The fourth amendment guarantees that right to the average citizen as well as to the average criminal. The outcome of this case highlights the anomaly, to which I adverted in my original dissent to the panel opinion, created by the majority's desire to restrict the scope of fourth amendment protections to cases in which the police, or other state actors, are engaged in investigative activity. That approach would extend greater fourth amendment protection to those suspected of crimes than to those against whom the police harbor no suspicions at all. *See* 923 F.2d at 1253. Unlike the majority, I do not find this to be a "superficial" concern. Neither, apparently, has the Supreme Court, which has found it necessary on repeated occasions to reiterate that the applicability of the fourth amendment does not turn on whether the victim of a search or seizure was the object of police suspicion. *See, e.g., O'Connor v. Ortega*, 480 U.S. 709, 714–15, 107 S.Ct. 1492, 1496, 94 L.Ed.2d 714 (1987) (searches and seizures by government employers of the private property of employees subject to fourth amendment) (plurality opinion); *Wyman v. Jones*, 400 U.S. 309, 317, 91 S.Ct. 381, 385–86, 27 L.Ed.2d 408 (1971) ("one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior"); *Camara v. Municipal Court*, 387 U.S. 523, 530–31, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 (1967) ("even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority"); *Go-Bart Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374 (1931) ("[the fourth amendment] protects all, those suspected or known to be offenders as well as the innocent"); *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914) ("This protection reaches all alike, whether accused of crime or not....").

To fully appreciate the incongruous nature of the majority's position, one must also consider how this case might have played out had the police acted more reasonably. Imagine that the sheriffs had been less willing to accommodate the Soldals' landlord when she told them that she wanted the Soldals out because they were behind in their rent. Suppose that instead of immediately assisting the landlord's employees, the police had forced Mr. Soldal to show them his lease, threatening to have his trailer towed away if he did not comply with their demand. Had the police done nothing further, they would certainly have disrupted the lives of the Soldals far less than they did when they helped to seize the trailer. And yet, under the majority's view, the Soldals might nevertheless have a fourth amendment cause of action—relating to the coerced "search" for the lease—when they would have no fourth amendment action if the police had dispensed with any investigation and had simply taken their cue from the landlord. Such a result, I suggest, has little to recommend it.

The majority nevertheless endorses this outcome. My colleagues apparently fear that recognizing the Soldals' fourth amendment claim will unleash in the federal courts a torrent of litigation stemming from private repossessions.[5] As I do not believe that government officials routinely ignore the law and evict people from their homes solely at the whim of private creditors, I do not share that concern. Even assuming for a moment that the incidence of such conduct is significant, it would not justify denying access to the federal courts to redress a meaningful constitutional injury. The majority's concern stems from its insistence on characterizing this case as a "garden variety" property dispute, but when police embroil themselves in such disputes, I submit that they lose their generic quality. This is not, as the majority alleges, an ordinary dispute between landlord and tenant, nor is it a case in which the police merely tried to "keep the peace." This is a troubling case in which the claim is that a landlord and the local police illegally teamed up to dislodge a man's home from its moorings and towed it away simply because they both found him disagreeable. I see *nothing* ordinary about this course of events, nor can I view it as a simple case of jumping the gun on otherwise constitutional state procedures.

The majority claims that the Soldals had other constitutional remedies available to them; their claim, says the court, is really a procedural due process claim that must be brought in state court if adequate remedies are available there. The Soldals' claim is no more a procedural due process claim, however, than is *any* fourth amendment claim; indeed, it is less so. A warrantless search may be "reasonable," in the sense that it is based on probable cause, and nevertheless violate the fourth amendment simply because those conducting the search failed to comply with the warrant procedures prescribed by law. *Katz*, 389 U.S. at 356–57, 88 S.Ct. at 514. Here, the police neither complied with the eviction procedures required by law nor (so far as we know) had any basis for believing that the eviction was warranted substantively.

As I pointed out in my original panel dissent, the Court in *Zinermon v. Burch* used a fourth amendment violation as the paradigmatic example of a case in which a plaintiff "may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common-law remedies...." 494 U.S. 113, 110 S.Ct. 975, 982–83, 108 L.Ed.2d 100 (1990). The Court explained that procedural due process claims are those in which "the deprivation by state action ... is not in itself unconstitutional." *Id.* As we have seen, unreasonable seizures are unconstitutional in and of themselves, and *Zinermon* should therefore set to rest any attempt to invoke the availability of state remedies as a ground for denying fourth amendment claims.[6]

4. To be sure, that a seizure has been preceded by a lawful invasion of privacy can be *relevant* to whether the seizure itself is reasonable. *See Jacobsen*, 466 U.S. at 120–22, 104 S.Ct. at 1660–61. But that is not to say that the applicability of the fourth amendment turns on an invasion of privacy but only that whether there has been a lawful invasion of privacy bears upon whether a subsequent seizure comports with the amendment's requirement of reasonableness. In the same way, the length of the deprivations suffered may be relevant to the reasonableness of the police actions, but not to the question of whether the fourth amendment applies at all. *Place*, 462 U.S. at 708–09, 103 S.Ct. at 2645.

5. Judge Easterbrook goes the majority one better, raising the specter that recognizing the Soldals' fourth amendment claim would open the flood gates to negligence claims clothed in the fourth amendment. Specter it is, though, because a seizure is the product of an intentional application of force, a point *California v. Hodari D.*, — U.S. —, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), underscores.

6. Respectfully, Judge Easterbrook's reference to *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), puts the cart before the horse. The issue here is whether there has been a seizure within the meaning of the fourth amendment, not whether the seizure was reasonable. *Elkins* states that compliance with state procedures is not the benchmark of fourth amendment reasonableness. It, like *Zinermon*, rejects the view that the fourth amendment's scope depends on either the availability or adequacy of state procedures. As for the "reasonableness" of the seizure, I note only that the majority opinion acknowledges that the deputies did more than "keep the peace" and that we have held that in damages suits for alleged civil

This point was apparently not lost on the Soldals, who never attempted to characterize their claim as one for procedural due process, a fact acknowledged in the original panel opinion. *See* 923 F.2d at 1248.

Zinermon notwithstanding, the majority claims that *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), supports its approach. Once again, however, the majority and I part company over precedent. I would argue that *Graham* does not, as the majority claims, stand for the principle that the dominant *character* of the conduct challenged in a section 1983 case determines the only constitutional standard under which the case may be evaluated; that would mean that civil rights plaintiffs would be obliged to choose a single constitutional provision in which to ground their suits, even when the alleged infringement encompasses more than one constitutional provision (say, for example, the first and fourth amendments, as in cases where the authorities seize allegedly obscene materials not for evidentiary purposes but simply to destroy them; these seizures must be reviewed under both the first *and* the fourth amendments—*see Heller v. New York*, 413 U.S. 483, 491, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745 (1973)). *Graham* is more accurately described, as it was in *Schroeder v. City of Chicago*, 927 F.2d 957, 961 (7th Cir.1991) (Posner, J.), as establishing a preference for grounding section 1983 actions in specific provisions of the bill of rights where possible rather than relying on the more inchoate protections afforded by the doctrine of substantive due process. *See* 490 U.S. at 395, 109 S.Ct. at 1871 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). In this light, the majority's view that *Graham* requires the Soldals to rely on the due process clause in any fashion when they have a cause of action under the fourth amendment seems untenable.[7]

In an era in which "reasonable expectations of privacy" seem to be diminishing, preserving the sanctity of the home becomes all the more critical. We take too lightly "the right to be let alone" when we conclude that the fourth amendment has no possible relevance to a claim that deputy sheriffs, in contravention of the laws they are charged to know and uphold, helped roust a family from their home and cart it away at the behest of a trailer park manager. That is exactly the type of governmental intrusion that the fourth amendment regulates, whether we label the intrusion one of privacy, property, or liberty. The majority believes that we should recognize one more "fine distinction" in fourth amendment law—one that I find nowhere evident in the language of the amendment itself or the opinions of the Supreme Court—to stem an anticipated onslaught of fourth amendment *poseurs*. That belief provides little justification for hastening the demise of the most significant citadel of solitude available to Americans. The majority opinion does not merely nibble at the margins of the fourth amendment's protections; it gnaws at their very core. Some thirty years ago, dissenting from the Supreme Court's refusal to address the merits of a challenge to a Connecticut law prohibiting the use of contraceptives by married couples in *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), Justice Harlan anticipated and addressed precisely the argument the majority surfaces today, and I cannot improve upon his analysis:

> [I]t must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment ... [was] intended to protect: here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind the home derives its preeminence as the seat of family life.

Id. at 551, 81 S.Ct. at 1781. The majority's opinion compromises that preeminence, and I am therefore obliged to dissent.

7. This is particularly true in light of the fact that the Soldals raised a *substantive* due process claim, but the original panel majority chose not to address it. *See* 923 F.2d at 1251.

rights violations involving the fourth amendment, the reasonableness of police action is a question of fact for the jury. *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir.1985) (*en banc*).

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Union National Bank of Chicago, Plaintiff-Appellant,

v.

Lillian WRIGHT, also known as Lillian Wright Lawler, Defendant-Appellee.

No. 90-2217.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 26, 1991.

Decided Aug. 29, 1991.

Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver of failed bank, sued former director of bank for amounts allegedly due under three facially unconditional notes signed by her. The United States District Court for the Northern District of Illinois, Brian Barnett Duff, J., denied FDIC's motion in limine seeking to bar borrower's lack of consideration defense on basis of *D'Oench* doctrine and found for borrower on each of three notes. FDIC appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) FDIC was entitled to raise amendment to statute making *D'Oench* doctrine applicable to FDIC as receiver for first time on appeal; (2) amended version of statute making *D'Oench* doctrine applicable to FDIC as receiver could be applied retroactively; (3) *D'Oench* doctrine was applicable even though borrower did not intend to defraud; (4) FDIC could raise reasonable inference of loans' validity by resting solely upon assertion that as general practice it did not remove written instruments from closed or inactive files once bank had been closed; and (5) letter indicating that one note had been satisfied from funds held in director's escrow account did not satisfy requirements of statute codifying *D'Oench* doctrine so as to raise defense of discharge of loan obligation.

Reversed.

1. Federal Courts ⇐617

Failure of Federal Deposit Insurance Corporation (FDIC) to raise amendment to statute codifying *D'Oench* doctrine making statute directly applicable to FDIC in its receiver capacity as bar to borrower's defense of lack of consideration in trial court did not preclude FDIC from raising issue on appeal, where, in substance, argument was actually raised by FDIC, although FDIC misstated law, and it was unclear whether Congress intended protections afforded FDIC under statute to be waived by failure to assert, specifically, right to those protections. Federal Deposit Insurance Act, § 2(13)(e), as amended, 12 U.S.C.A. § 1823(e).

2. Banks and Banking ⇐502

Amendment to statute codifying *D'Oench* doctrine making doctrine applicable to Federal Deposit Insurance Corporation in its capacity as receiver could be applied retroactively, where retroactive application would not infringe upon matured right held by borrower or impose any new obligation upon her without notice. Federal Deposit Insurance Act, §§ 2[11], 2(13)(e), as amended, 12 U.S.C.A. §§ 1821, 1823(e).

3. Banks and Banking ⇐506

D'Oench doctrine barred borrower's defense that facially unqualified notes lacked consideration due to side agreement with bank that notes would not be payable

APPENDIX B

SERIES

sponsible for estimating the ex-
of future claims to the company
es of financial planning.

ng whether this evidence estab-
amount of damages with the
rtitude, we are mindful that
does not require impossibilities;
therefore require a higher de-
tainty than the nature of the
.'" *Pierce v. New York Cent.*
.2d 1392, 1398 (6th Cir.1969)
ison v. Chandler, 11 Mich. 542,
see also Restatement (Second)
12 (1977). "'And when, from
f the case, the amount of dam-
t be estimated with certainty
see no objection to placing
ury all the facts and circum-
e case, having any tendency to
es, or their probable amount;
ıble them to make the most
d probable estimate which the
e case will permit.'" *Story*
282 U.S. at 564, 51 S.Ct. at 251
son, 11 Mich. at 555–56). Al-
question is a close one, we
Broan's evidence of damages
vn with as much certainty as
f the tort and the circum-
t. The expert testimony of-
brink provided "a sufficient
jury's computation of the
low, 327 U.S. at 266, 66 S.Ct.
nishing data from which the
probable loss could be ascer-
natter of reasonable infer-
an Kodak Co. v. Southern
ls Co., 273 U.S. 359, 379, 47
71 L.Ed. 684 (1927). Finally,
roperly instructed that the
nages could not be deter-
culation or conjecture but
on evidence showing a rea-
f computation, although the
ly be approximate. There-
ide that the District Court
allowing the jury to award
staken future product liabil-

award of damages for mis-
ability claims was proper,
of determining how much

of the jury award was for such claims and, therefore, we cannot affirm any particular award. Because we must remand for presentation of Broan's lost future profits theory the entire damages case must be retried.

[5] One additional matter that must be addressed on retrial is that of reducing any future damages to their present value. It is elementary that in cases of present allowance for future loss a defendant is entitled to a discount to present value for the advance payment. *See, e.g., Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 339, 108 S.Ct. 1837, 1844, 100 L.Ed.2d 349 (1988) ("'[D]amages awards in suits governed by federal law should be based on present value.'") (quoting *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409, 412, 105 S.Ct. 1347, 1349, 84 L.Ed.2d 303 (1985)).

[6, 7] Finally, Associated and Republic argue that even if this Court is inclined to allow mistaken product liability claim damages, those damages should be awarded in the form of a declaratory judgment ordering an accounting of such damages as they are incurred by Broan in the future. It is true that such a remedy would seemingly eliminate the need for any projections of future claims. However, this remedy was considered by the District Court and was not adopted. The decision whether to grant a declaratory judgment and more generally the decision regarding the appropriate recovery to be afforded under the Lanham Act rests in the sound discretion of the District Court. *See* 15 U.S.C. § 1117(a); *Dresser Indus., Inc. v. Insurance Co. of North America*, 358 F.Supp. 327, 330 (N.D.Tex.), *aff'd*, 475 F.2d 1402 (5th Cir.1973). In view of the potential problems presented by such prospective relief we cannot say that the District Court abused its discretion in refusing to grant declaratory relief in lieu of present money damages.

V.

This Court may grant a partial new trial limited to the issue of damages if damages are sufficiently separate that a new trial on damages would be fair. *See Gasoline Pro. Co. v. Champlin Refining Co.*, 283 U.S. 494, 498–99, 51 S.Ct. 513, 514–15, 75 L.Ed. 1188 (1931); 6A Moore's Federal Practice ¶ 59.06 (2d ed. 1979). In this case the damages issues are adequately distinct from the liability questions that a new trial on damages alone is appropriate.

Accordingly, we AFFIRM the allowance of damages for future mistaken product liability claims, we REVERSE the District Court's refusal to allow evidence of lost profits damages, and we REMAND for a partial new trial on the issue of damages.

Edward SOLDAL and Mary Soldal, individually and as legal guardians for Jimmy Soldal, Alena Soldal, Joseph Soldal and Jessie Soldal, Plaintiffs–Appellants,

v.

COUNTY OF COOK, et al., Defendants–Appellees.

No. 89–3631.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 14, 1990.

Decided Jan. 24, 1991.

Trailer park tenants brought action against county, officers of sheriff's office, landlord, park manager, and other private individuals to recover for conspiracies to damage trailer during eviction and to unlawfully arrest tenant. The United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., dismissed claims. Tenants appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) unlawful eviction deprived tenants of procedural, not substantive, rights, and,

thus, damage to trailer and deprivation of use as result of eviction did not violate substantive due process; (2) removal of trailer was not search or seizure under Fourth Amendment; and (3) alleged arrests for trespass and criminal assault were unlawful.

Affirmed in part, reversed in part, and remanded.

Flaum, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Constitutional Law ⇐278.3
Landlord and Tenant ⇐388

Physical damage to tenant's trailer during eviction was deprivation of due process property interest. U.S.C.A. Const. Amends. 5, 14.

2. Constitutional Law ⇐278(1)

"Deprivation" is state of being deprived of something and comes into being when due process property interest is taken from owner; what happens to property—whether it is used by someone else or destroyed—is irrelevant. U.S.C.A. Const. Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights ⇐198(4)

Judgment could be obtained against private defendants in § 1983 action only if private defendants were in cahoots with deputy sheriffs involved in eviction and arrest of trailer park tenant. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 4, 5, 14.

4. Conspiracy ⇐19

Trailer park manager's call for deputy sheriffs to be present at scene of expected violence, eviction of tenants, did not establish conspiracy between deputies and manager.

5. Conspiracy ⇐2

Conspiracy is agreement, and police do not enter into agreement with complainant when they arrest person upon complaint, thereby doing their duty to enforce law, or when they stand by at scene of potential violence, hoping by their presence to deter breach of peace.

6. Conspiracy ⇐2

Conspiracy comes in when private persons and public police agree to act jointly to achieve common end.

7. Landlord and Tenant ⇐392

Trailer park tenants could be evicted under Illinois law only if landlord had eviction order. Ill.S.H.A. ch. 110, ¶¶ 9–101 et seq.

8. Landlord and Tenant ⇐388

Trailer park tenant had a right to use "mild force"—force not intended or likely to cause actual physical injury—to prevent destruction of property during unlawful eviction. Ill.S.H.A. ch. 38, ¶ 7–2.

See publication Words and Phrases for other judicial constructions and definitions.

9. Civil Rights ⇐198(7)
Constitutional Law ⇐254(2)

Deputy sheriffs' presence that prevented trailer park tenant from exercising statutory right to defend his property during unlawful eviction was "state action" for purposes of due process clause and § 1983. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 5, 14; Ill.S.H.A. ch. 38, ¶ 7–2; ch. 110, ¶ 9–101 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

10. Constitutional Law ⇐278.3

Deputy sheriffs' alleged acts depriving trailer park tenant of procedural rights to hearing before eviction did not violate procedural due process, where pecuniary damage to trailer could be recovered in trespass suit against landlord. U.S.C.A. Const. Amends. 5, 14; Ill.S.H.A. ch. 38, ¶ 7–2; ch. 110, ¶ 9–101 et seq.

11. Civil Rights ⇐209

Denial of procedural rights as result of random and unauthorized acts of subordinate public officers is not actionable in suit under § 1983 unless plaintiff lacks adequate remedies under state law. 42 U.S.C.A. § 1983.

12. Civil Rights ⇐209

Existence of adequate state judicial remedies is no bar to maintenance of suit for violation of substantive due process. U.S.C.A. Const.Amends. 5, 14.

13. Eminent Domain ⇐131

If government takes private property for public use, it need only pay owner fair market value of property. U.S.C.A. Const. Amend. 5.

14. Eminent Domain ⇐61

If government takes private property for private use, taking is not privileged by takings clause. U.S.C.A. Const.Amend. 5.

15. Constitutional Law ⇐278.3

Unlawful eviction of trailer park tenants was denial of procedural, rather than substantive, rights under Illinois law, and, thus, deprivation of use of trailer and damage to trailer in presence of deputy sheriffs did not violate substantive due process. U.S.C.A. Const.Amends. 5, 14; Ill.S.H.A. ch. 38, ¶ 7–2; ch. 110, ¶ 9–101 et seq.

16. Searches and Seizures ⇐13

Removal of trailer from trailer park during unlawful eviction of tenant in presence of deputy sheriffs was not "search" or "seizure" within meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4; Ill.S.H.A. ch. 110, ¶ 9–101 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

17. Civil Rights ⇐209

Constitutional right that is not simply elementary due process right to notice and hearing is actionable under § 1983 regardless of adequacy of plaintiff's remedies under state law. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

18. Searches and Seizures ⇐85

Physical damage to home inflicted in course of search or arrest or other seizure is actionable under Fourth Amendment. U.S.C.A. Const.Amend. 4.

19. Constitutional Law ⇐12
Statutes ⇐184

Statutes and constitutional provisions are not cabined to particular abuses that gave rise to enactment.

20. Arrest ⇐63.4(15)

Deputy sheriff who knew of trailer park manager's exclusion of tenant from park lacked probable cause to arrest tenant for trespass at trailer home of tenant's friend, in that Illinois' criminal trespass statute contained express exception for lessee's invitee. U.S.C.A. Const.Amend. 4; Ill.S.H.A. ch. 38, ¶ 21–3.

21. Arrest ⇐63.4(15)

Trailer park tenant was unreasonably arrested for criminal assault after allegedly inviting purported victim to step outside for fight, in that invitation was not assault under Illinois law. U.S.C.A. Const. Amend. 4; Ill.S.H.A. ch. 38, ¶ 12–1(a).

22. Assault and Battery ⇐48

Allegedly inviting someone to step outside for fight was not criminal assault under Illinois law. Ill.S.H.A. ch. 38, ¶ 12–1(a).

23. Assault and Battery ⇐48

Apprehension of imminent battery is not reasonable under Illinois law, if defendant's words, however otherwise threatening, expressly negative condition required for battery to occur. Ill.S.H.A. ch. 38, ¶ 12–1(a).

24. Conspiracy ⇐17

Mere fact that purported victim of assault filed criminal charges would not make him conspirator with sheriff's police.

25. Civil Rights ⇐206(4)

Harassment of trailer park tenants during eviction could not be imputed to county in § 1983 suit; harassment was isolated abuse of power of which sheriff and other officials were completely ignorant. 42 U.S.C.A. § 1983.

26. Civil Rights ⇐206(3)

Plaintiff seeking to make county liable under § 1983 for acts of deputy sheriffs must show direct involvement of policy-making level of sheriff's office in illegal

activity of its employees. 42 U.S.C.A. § 1983.

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Randolph M. Johnston, Office of the State's Atty., Chicago, Ill., John C. Vojta, Vojta & Lagattuta, Schaumburg, Ill., for Jeffrey Peterson, Kimberly Giovanni and Margaret Celeski.

Randolph M. Johnston, Office of the State's Atty., John J. George, Dennis J. Aukstik, Robert T. Oleszkiewicz, Daley & George, Chicago, Ill., for Margaret Hale and Terrence Properties Inc.

Before CUDAHY, POSNER, and FLAUM, Circuit Judges.

POSNER, Circuit Judge.

This matter is before us on the appeal of the plaintiffs, Edward Soldal and his family, from the dismissal of their civil rights suit (42 U.S.C. § 1983) on the defendants' motion for summary judgment. The defendants are Cook County, Illinois; several officers of the Cook County sheriff's office; Terrace Properties, which owns a trailer park in Elk Grove, Illinois; and Margaret Hale, the manager of the park, together with several other private individuals.

The Soldals had rented a lot in the park as a site for their trailer home, in which they lived with their four children. In August 1987, Terrace Properties filed a suit in an Illinois state court to evict the Soldals. A hearing was scheduled for September 22, but more than two weeks before then Hale called the Cook County sheriff's office to say that she was planning to evict a family that day (September 4) and that, because she feared that the family might resist being evicted, she wanted deputy sheriffs to be present. That afternoon two employees of Terrace Properties came to the Soldals' trailer accompanied by a deputy sheriff. The employees began by wrenching the sewer and water boxes off the side of the trailer home, causing damage to it. When Soldal asked the workers what they were doing, they told him to ask the deputy sheriff, which he did, and the reply was that "he [the deputy sheriff] was there to see that [Soldal] didn't interfere with [Terrace's] workers." The workers tore off the skirting and canopy of the trailer and hooked a tractor to it. Although they also disconnected the phone, Soldal called his lawyer from a pay phone and she in turn called the sheriff's office—which at first denied that there was any deputy sheriff on the scene. Getting no satisfaction, the lawyer advised Soldal, in a second conversation from the pay phone, to file a complaint against Terrace Properties for criminal damage to his property.

When Soldal returned to the trailer from the pay phone, he found two more deputy sheriffs at the scene. He told them that he wanted to file a complaint and they referred him to a lieutenant of the sheriff's police, who was in Hale's office. Soldal went there, and the lieutenant came out and told him to wait outside, then went back in and remained closeted with Hale and several other employees of Terrace Properties for twenty to thirty minutes. When he emerged he told Soldal to talk to the district attorney, then went back into the office. Re-emerging at the end of another half hour he told Soldal that he would not accept a complaint from him because "it was between the landlord and tenant ... [and] they were going to go ahead and continue to move out the trailer." The tractor now pulled the Soldals' trailer free from its moorings. Discussion about where it would be taken ensued, in the course of which Hale said to the lieutenant in Soldal's presence, "I'm going to tell him [Soldal] this in front of you [lieutenant], that he's not allowed to come back to the park," whereupon the lieutenant told Soldal, "Now, you heard what she said."

The Soldals went off to a motel for the night (Terrace Properties had offered to pick up the tab) but left two of their children with a friend who lived in another trailer home in the park. The next morning Soldal returned to the park to pick up

the children. He was seen entering the park, and while he was in the friend's trailer a deputy sheriff (who had not been present at the eviction the previous day) came and arrested Soldal because "you're not supposed to be here." He was kept in jail for several hours, charged with criminal trespass. The charge was later dropped.

Soldal continued making unsuccessful efforts to get the sheriff's office to accept a complaint from him. He had better luck in court. On September 9 the state court in which the eviction proceeding was pending found that Terrace Properties had not been authorized to evict the Soldals, and ordered Terrace to put the trailer back on the lot. This was done, but the trailer had been badly damaged during the eviction.

A month later one of the deputy sheriffs who had been involved in the eviction came to the Soldals' trailer, together with a man named Peterson, who had accused Soldal of having struck his car and now repeated the accusation. Soldal replied by accusing Peterson of lying and invited him to step out into the street. The invitation was not taken up but the deputy sheriff asked Peterson whether he wanted to press criminal charges, and when he said he did the deputy sheriff arrested Soldal. Soldal was charged with criminal assault, apparently based on the invitation to fight rather than on whatever earlier skirmishes led the police, with Peterson in tow, to his door. He was also charged with other crimes upon the complaint of two other private persons, who are named as defendants in this suit along with Peterson. But as there is no detail in the record concerning these additional charges and defendants, we ignore them except to note that the charges were later dropped, as was the charge of assaulting Peterson.

Our recital construes the facts as favorably to the plaintiffs as the record will permit. That is what we are supposed to do when deciding whether summary judgment should have been granted. Of course the true facts may turn out to be different and less favorable to the plaintiffs.

The complaint charges in effect two conspiracies. In the first, Terrace Properties and Margaret Hale are accused of conspiring with Cook County and the officers of the sheriff's police to damage the Soldals' trailer and to arrest him without cause. In the second, Peterson is accused of having conspired with Cook County and the officers (not all the same ones) to arrest Soldal a month later. Pendent counts recast the various claims as violations of state tort law as well. On the defendants' motion for summary judgment the district judge dismissed all the claims, both federal and state, on the merits. First of all he found that there had been no conspiracy. True, there was a puzzle: "if the Terrace Properties defendants were clearly committing a criminal trespass, why did the members of the Sheriff's Police who were present—and who were called to the scene by the evicting defendants—stand idly by and do nothing? A reasonable inference would be that they conspired with the private parties not to act." But the sheriff's police "were under no state-law duty to stop the eviction, and in fact were under an opposite duty to *not* intervene on either side unless some other infringement of the criminal code was committed.... [A] criminal trespass arrest and prosecution cannot be used as a means to determine the right to possession. *People v. Evans*, 163 Ill.App.3d 561, [114 Ill.Dec. 662], 516 N.E.2d 817 (1st Dist.1987)." (Emphasis in original.) As for the two arrests, they were based, the district court concluded, on probable cause.

To recover damages for having been deprived of their property without due process of law, the Soldals must show first that there was a deprivation of property, and second that it was a deprivation by officers of the state. Only after these questions are answered in the affirmative does the question whether there was a denial of due process arise.

[1, 2] The physical damage that Terrace's workers did to the trailer was a deprivation of property. To establish this proposition we begin by noting that if the property had been completely destroyed, this would have been as much a deprivation

as if it had been taken away. *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir.1983). Compare *United States v. General Motors Corp.*, 323 U.S. 373, 384, 65 S.Ct. 357, 362, 89 L.Ed. 311 (1945), which establishes that proposition for takings cases. "Deprivation" is the state of being deprived of something, and therefore comes into being when the property is taken from the owner; what happens to the property—whether it is used by someone else or destroyed—is an irrelevance. Severe damage is a partial but, we think, an actionable deprivation. Although we can find no cases on the point, a persuasive analogy is that temporary deprivations frequently have been held actionable under section 1983, as in *Tavarez v. O'Malley*, 826 F.2d 671, 674 (7th Cir.1987). We cannot see a principled difference between a temporary deprivation on the one hand and damage that reduces the present value of the property to the owner by the same amount, on the other. No doubt, trifling diminutions of value may be disregarded as not rising to the level of deprivations; but that is not a consideration in this case.

[3] But the workers who damaged the Soldals' trailer home were private employees. Only if they, or more plausibly their boss, Hale, were in cahoots with the deputy sheriffs involved in the eviction and arrest can the Soldals obtain a judgment against these private defendants. Of course, if the Soldals can get a judgment against the public defendants, then as a practical matter they do not need to be able to get a judgment against the private ones as well, since a plaintiff is not entitled to a duplicative recovery. The Soldals need not worry that the deputy sheriffs might be judgment-proof. The state will indemnify the deputy sheriffs against any judgment that might be entered, Ill.Rev.Stat. ch. 34, ¶ 5–1002; *Joseph v. Brierton*, 739 F.2d 1244, 1246 (7th Cir.1984), and this as a practical matter guarantees the collectibility of a judgment even if Cook County is dropped as a defendant, as we think it must be for the reasons stated at the end of this opinion.

So why have the Soldals charged conspiracy? Why have they not proceeded just against the public defendants? The answer is that they must have been concerned, rightly or wrongly (wrongly as we shall see), that since a mere failure by police to prevent a private person from damaging the property of another is not actionable under the Constitution, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Soldals would not be able get a judgment against the public defendants, at least so far as the property damage inflicted during the eviction is concerned, unless they proved that the deputy sheriffs had conspired with the private defendants and hence were responsible for the acts of the private defendants committed in furtherance of the conspiracy.

[4–6] So let us consider whether there is any basis for supposing that there was such a conspiracy. We begin by noting that the fact that a private person calls the police to a scene of expected violence—even the fact that he persuades the police to arrest someone—does not establish a conspiracy between the police and him. *Gramenos v. Jewel Cos.*, 797 F.2d 432, 435 (7th Cir.1986); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352–53 (7th Cir.1985); *Johnson v. Miller*, 680 F.2d 39, 40–41 (7th Cir.1982). A contrary conclusion would vastly expand the reach of federal civil rights law, not only by bringing a myriad of private individuals within the law's scope but also by bringing most police inaction within its scope as well. These consequences are a reason for not letting the concept of conspiracy expand to its logical limits. And the concept itself would be deformed rather than completed by being interpreted to cover this most elementary of citizen-police interactions. A conspiracy is an agreement, and the police do not enter into an agreement with the complainant when they arrest a person upon his complaint, thereby doing their duty to enforce the law, or when they stand by at a scene of potential violence, hoping by their presence to deter a breach of the peace and in this case doing so successfully. As the cited cases explain, conspiracy comes in

when private persons and public police agree to act jointly to achieve a common end, here the removal of a troublesome tenant—troublesome, perhaps, to the police as well as to the landlord, for quite apart from having been behind in his rent, Mr. Soldal is apparently a quarrelsome fellow.

[7] One bit of indirect evidence of a conspiracy of this sort is that the deputy sheriffs—whose principal function after all is enforcing eviction orders—must have known that the trailer park had no right to evict the Soldals. To evict lawfully you need an eviction order, which Terrace Properties did not have. And the deputy sheriffs knew it did not have one. Terrace Properties had brought a proceeding to obtain such an order, but you cannot on the strength of filing a complaint proceed as if you had already won and obtained an order ready to be executed. All this is perfectly plain as a matter of Illinois law. As held in *People v. Evans*, *supra*—it is a mystery to us why the district judge cited this case, considering his conclusion—Illinois' Forcible Entry and Detainer Act, Ill.Rev.Stat. ch. 110, ¶¶ 9–101 *et seq.*, provides the exclusive remedy for recovering possession of land from a tenant who is in actual and peaceable, although not necessarily rightful, possession of the plaintiff's property. The plaintiff can obtain a judgment of eviction against the overstaying tenant but until he does so he has no authority to dispossess the tenant. Terrace Properties obtained no judgment of eviction, either before it dispossessed the Soldals or afterward.

Why then did the deputy sheriffs not stop the eviction, and why did they not accept the criminal complaint that Soldal wanted to file against the landlord who was dispossessing him and his family unlawfully? *People v. Evans* does not hold or suggest that the police must stand by while people use violence to enforce their claims of legal right. In that case, a tenant refused to sign a lease. The landlord told her to get out. She refused. The police arrested her on the landlord's complaint for criminal trespass. The court said this was the wrong way to proceed. The landlord should have obtained an eviction order. That is exactly what Hale should have done.

[8] Perhaps what the district judge had in mind in citing *Evans* is that Soldal, like the landlord in *Evans*, would not have been entitled to use self-help to prevent the removal and damage of his trailer. The deputy sheriff was on the scene to prevent him from exercising that self-help. But the situations are not symmetrical. Joyce Evans was sitting quietly in the house she had rented. She was not breaking things. There was no occasion to use force against her. Terrace's employees were destroying valuable property of the Soldals. Soldal would have been within his common law (now statutory) right of self-help to use mild force—force not intended or likely to cause an actual physical injury—to prevent that destruction. *M'Ilvoy v. Cockran*, 9 Ky. 271 (1820); Ill.Rev.Stat. ch. 38, ¶ 7–2. He certainly was entitled to call on the police to obviate the need for self-help by preventing what was undoubtedly a criminal trespass to his property, since the trespassers were not acting under even a colorable entitlement.

[9] Which shows by the way that this is not a case of inaction. Without the presence of the police, Mrs. Hale might have feared to order the forcible removal of the trailer from its moorings. The police prevented Soldal from exercising his statutory right to defend his property. That is state action. *Howerton v. Gabica*, 708 F.2d 380 (9th Cir.1983); *Booker v. City of Atlanta*, 776 F.2d 272, 273 (11th Cir.1985) (per curiam). It was therefore not necessary for the Soldals' lawyer to drag in conspiracy doctrine for the purpose of imputing the action of the private defendants to the public ones, or for any other purpose that we can see. But the plaintiffs have chosen to cast their claim as one of conspiracy, thereby raising the difficult question whether the sheriff's police were acting in agreement with Mrs. Hale or other agents of Terrace Properties in preventing Soldal from defending his property; so we shall soldier on. There is some evidence of agreement, beyond the scraps already men-

tioned. The terms in which the deputy sheriffs spoke to Soldal ("we're here to prevent you from interfering with Terrace's workers" and "you heard what she said") could be thought to imply that they considered themselves Hale's agents. Then there are those long confabs between the sheriff's lieutenant and Hale and other employees of Terrace. What were they all talking about? May they not have been discussing the best, albeit an illegal, way to get rid of a village pest?

An agreement is bilateral, however; so we must ask, what could there have been in it for the sheriff's office? Well, the sheriff's office may have regarded Soldal as a troublemaker and therefore have been happy to cooperate with Terrace Properties in getting rid of him. All this is terribly speculative, though—and in the end quite irrelevant. Suppose the Soldals *have* made out a prima facie case that Terrace and Hale conspired with public officers to circumvent the procedural protections to which Illinois law entitles tenants such as the Soldals, and in the course of the conspiracy damaged the trailer. Or suppose, forgetting conspiracy, that the plaintiffs have made out a prima facie case that the sheriff's police deprived them of the trailer, which was their property, and in the course of that deprivation damaged the trailer. Either way, the plaintiffs could not, at least as they have framed the case, obtain damages for the deprivation.

[10, 11] The denial of procedural rights as a result of the random and unauthorized acts of subordinate public officers—a good description of the acts of the deputy sheriffs in this case—is not actionable in a suit under section 1983 unless the plaintiff lacks adequate remedies under state law. *Zinermon v. Burch*, — U.S. —, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The damage to the trailer was purely pecuniary, and can be recovered in a suit against Terrace Properties for trespass in violation of Illinois law. (We are perplexed that the Soldals did not append a state law trespass claim as a pendant to their constitutional claims.) The Soldals do not argue that such a remedy would be inadequate; make nothing of the fact that it would not be a remedy against the public defendants (and the briefs are silent about the existence or adequacy of a state law remedy against those defendants); do not argue that a pre-deprivation hearing would have been feasible; do not argue that, if such a hearing would have been feasible, a state law remedy that did not provide for one would be inadequate; make nothing of the fact that the deputy sheriff checked with his superiors during the eviction (but see *Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir.1990) (en banc)). Finally, in their reply brief they forgo any claim to a denial of their procedural rights. We conclude that there is no issue of procedural due process before us.

[12–15] This does not end the matter, because in some cases, as the Soldals emphasize, a deprivation of property can be attacked as a violation of substantive due process, and then the existence of adequate state judicial remedies is no bar to the maintenance of the constitutional tort suit. *Zinermon v. Burch*, *supra*, 110 S.Ct. at 983. As a matter of federal constitutional law, if the government takes private property for a public use it need only pay the owner the fair market value of the property. But if it takes private property for a private use—say it takes the Soldals' trailer and gives it to Mrs. Hale because she is a personal friend of powerful public officials—then the taking is not privileged by the takings clause of the Fifth Amendment, viewed as a grant of power to the government to take a person's property upon payment of its fair market value ("just compensation"). It is then a naked deprivation of property, and the owner is entitled to get it back or, if that is infeasible, to obtain full common law damages. An action so conceived is a plausible, though not clearly proper, invocation of substantive due process, for reasons explained in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464–66 (7th Cir.1988). But it is of no help to the Soldals. The defendants were not trying to take the trailer and give it to someone else; they were trying to make an eviction without providing the procedural safeguards to which Illinois law

entitles a tenant; they were denying the Soldals' procedural, not their substantive, rights. Cf. *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir.1986).

It makes no difference if the focus is switched from the removal of the trailer from the trailer park to the physical damage done to the trailer in the process of eviction. Since there may be, we have conceded, cases in which the taking by public officers of private property for a private rather than for a public use can be construed as a denial of substantive due process, there may also be cases in which wanton, gratuitous damage to private property by public officers can be construed as a denial of substantive due process. But that is not the nature of the Soldals' allegation. Their allegation is that the eviction was unlawful—which it was—and *therefore* they are entitled to recover the costs that the eviction imposed on them, costs that include both the damage to the trailer and the deprivation of the use of the trailer. If the limitations on challenging procedural violations on constitutional grounds can be got round by charging every *consequence* of the violation as a denial of substantive due process, those limitations are down the drain; every procedural due process claim is convertible into a substantive due process claim by the facile expedient of slicing the claim into its constituent parts. If the eviction had been proper, the incidental costs to the Soldals could not be made the basis of a constitutional claim; if it was improper—and it *was* improper—it was improper because the *procedures* prescribed by state law were not complied with.

[16, 17] This would be the end of the Soldals' case so far as the alleged conspiracy to evict them is concerned had the defendants not carried off the Soldals' trailer. But they did, and the Soldals argue that by doing so they seized the trailer in violation of the Fourth Amendment. If they are right, then the case again is out of the realm of purely procedural due process (i.e., right to notice and hearing); and, to repeat, a constitutional right that is not simply the elementary due process right to notice and a hearing is actionable under section 1983 regardless of the adequacy of the plaintiff's remedies under state law.

[18, 19] The question whether a repossession conducted or assisted by state officers is actionable under the Fourth Amendment was left open in *Fuentes v. Shevin*, 407 U.S. 67, 96 n. 32, 92 S.Ct. 1983, 2002 n. 32, 32 L.Ed.2d 556 (1972), and no other case addresses it. We are pretty confident that the Supreme Court would answer "no" if the issue ever came before the Court. Literally, it is true, what the defendants did here was to "seize" the plaintiffs' trailer. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). And since the Fourth Amendment guarantees the right of the people to be secure in their houses, papers, and effects, as well as in their persons, against unreasonable searches and seizures, physical damage to a home inflicted in the course of a search, or of an arrest or other seizure, is actionable under that amendment. But the damage is not itself the search or seizure. And the second clause of the Fourth Amendment, the warrant clause, indicates, what has long been assumed with ample support in the background and legislative history of the amendment, on which see Taylor, Two Studies in Constitutional Interpretation, pt. 1 (1969); Lasson, The History and Development of the Fourth Amendment to the United States Constitution, chs. 2, 3 (1937), that the searches and seizures to which the amendment refers are those made for purposes of law enforcement, not those incident to ordinary property disputes. It is true that statutes and, even more clearly, constitutional provisions are not cabined to the particular abuses that gave rise to the enactment. A pertinent example is that the Fourth Amendment has been extended to administrative searches of a sort not envisaged when the amendment was drafted. But it is equally true that taking a word out of context, whether a semantic or an historical context, is a frequent source of interpretive error. As a practical matter, we cannot see what is to be gained by converting every repossession by state officers and every condemnation of a house into a Fourth Amendment case.

It would mean that the Supreme Court's efforts to set limits on constitutional claims of procedural irregularities would be thwarted, because every deprivation of property without due process of law would be redescribed as a seizure of property in violation of the Fourth Amendment. We conclude that until Soldal was arrested, there was no search or seizure in the Fourth Amendment sense of those words.

[20] However devastating to the Soldals' efforts to obtain damages under federal constitutional law for damage to the trailer, this analysis does not affect Soldal's claims of false arrest. The first arrest occurred when Soldal returned the morning after the eviction to pick up his children. Had he been arrested on the street, by an officer unaware that Soldal had left his children with a friend in the trailer park, the arrest would have been based on probable cause to believe that Soldal was trespassing; for Hale had made clear to him in no uncertain terms that he was not welcome. But he was arrested at a friend's trailer home. The defendants do not argue that the arresting officer or anyone else believed that Soldal had broken into or otherwise forced his way into the trailer over the occupant's objection. He was there at the invitation of the occupant—and everyone knew this. Illinois' criminal trespass statute contains an express exception for a lessee's invitee, Ill. Rev.Stat. ch. 38, ¶ 21–3, so there is no basis for an argument that Soldal's presence in the trailer showed that he had committed a criminal trespass against Terrace Properties in order to get there. A reasonable officer would have inferred from the presence of Soldal as a guest in a tenant's home that he was not trespassing, and before making an arrest would at least have attempted to determine what Soldal was doing there, which he could easily have done by asking the tenant. When he discovered that Soldal was there at the tenant's invitation to pick up his children, he would have dropped any idea of arresting him. At least on the record before us, the arrest was not based on probable cause.

[21–23] The second arrest was just as unreasonable. The test for criminal assault is whether the defendant's conduct placed the victim in *reasonable* apprehension of an imminent battery. ¶Ill.Rev.Stat. ch. 38, ¶ 12–1(a). "Conduct" in this setting has traditionally been thought to imply a gesture, rather than just words. "Mere words" do not an assault make. *People v. Dudgeon*, 341 Ill.App. 533, 540, 94 N.E.2d 556, 560 (1950). We need not decide how much of this old saw survives in Illinois after *People v. Ferguson*, 181 Ill.App.3d 950, 130 Ill.Dec. 551, 537 N.E.2d 880 (1989), where a purely verbal threat to kick the complaining witness was held to constitute a criminal assault because the defendant was within kicking distance when he uttered the threat in what appeared to be a serious manner that made the witness think the defendant was in fact about to kick him. But all this is to one side of the present case. It has been the law for centuries that an apprehension of an imminent battery, however created, is not reasonable if the defendant's words, however otherwise threatening, expressly negative a condition required for the battery to occur. "If it were not assize-time, I would not take such language from you." *Tuberville v. Savage*, 1 Mod.Rep. 3, 86 Eng.Rep. 684 (1699). It *was* assize time, and the victim knew it. So there was no assault. No more was there one here, so far as appears from the record. Soldal invited Peterson to step outside. That is, he invited him to fight. An invitation is not a command, and a reasonable man would know this. It is as if Soldal had said, "If you were to accept my invitation to fight, I would knock your block off." Of course there may have been something in Soldal's tone, or in accompanying gestures, that intimated that Soldal would not accept a refusal of his invitation. But there is no evidence of such additional circumstances.

[24–26] The plaintiffs' false arrest claims should not have been dismissed, though what is gained by casting them in conspiracy terms eludes us, and the district judge may wish on remand to consider whether any of these conspiracy claims can be sustained. Certainly the mere fact that

Peterson filed criminal charges would not make him a conspirator with the sheriff's police. And we agree with the district judge that no basis has been presented for imposing liability on Cook County, even assuming that the sheriff, whose office is separate from the rest of the Cook County government, can be thought to make policy for the County. *Thompson v. Duke*, 882 F.2d 1180 (7th Cir.1989). So far as appears, the harassment of the Soldals was an isolated abuse of power of which the sheriff and other high officials were completely ignorant, so that the harassment cannot be imputed to the county government. The doctrine of respondeat superior has been rejected for cases under section 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). The plaintiffs must show direct involvement of the policy-making level of the sheriff's office in the illegal activity of its employees. *Id.* at 694, 98 S.Ct. at 2037; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). They have not done this. And for reasons stated earlier they also have failed to establish an entitlement to relief for the damage to the trailer. So the conspiracy to evict is out. But neither the main nor pendent counts relating to the arrests should have been dismissed, although the attempt to rope in the private complainants as conspirators seems dubious, to say the least. The judgment is therefore

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FLAUM, Circuit Judge, concurring in part and dissenting in part.

I join the majority's opinion that Soldal's false arrest claims must be remanded for trial. I also believe that his due process claim should be remanded, however, and therefore respectfully dissent as to the disposition of that claim.

I differ with the majority largely because I cannot agree that "denial of procedural rights" is a "good description of the acts of the deputy sheriffs in this case." *See supra* at 1248. The majority discusses substantive due process, and acknowledges that the damage done to the Soldals' trailer was a deprivation of property, one that raises at least a "plausible" substantive due process claim, but maintains that the Soldals' suit was not "an action so conceived." *See supra* at 1248. Even the defendants concede, however, that Soldal alleged a violation of substantive due process, *see* Brief at 2, and elsewhere in its opinion the court seems to acknowledge the same as well—*see supra* at 1245 (defendants "are accused of conspiring ... to damage the Soldals' trailer"). In my view, the Soldals' complaint should settle the matter, for it alleges that the defendants conspired to deprive them of their *substantive* due process rights by, among other things, *damaging* the trailer. *See* Complaint ¶ 31 ("Defendants ... conspired together to violate the constitutional rights of Plaintiffs by unlawfully evicting Plaintiffs, removing them from the trailer park, *and destroying their property*....") (emphasis added); *see also* ¶ 33 (explicitly alleging violation of "substantive due process"). Respectfully, these allegations do not support the majority's view that the nature of the Soldals' due process claim is procedural only.

The majority maintains that the damage to the Soldals' trailer was merely the consequence of the procedural violation, rather than an independent deprivation, but that is a neither a meaningful nor instructive distinction. An eviction order does not constitute a license to pillage the property subject to the order, and it is hard to imagine how wanton destruction inflicted during the course of an otherwise lawful eviction would be an "incidental" effect of carrying out the eviction. In my judgment, no amount of procedure could have legitimized an effort to intentionally damage the Soldals' trailer, which—reading the facts in the light most favorable to the Soldals—is what happened. As Judge Posner's factual narrative suggests, there is sufficient evidence to support an inference that the trailer park employees, aided by the actions of the sheriff's deputy, deliberately damaged the trailer. Since, as the majority recognizes, "severe damage is a partial ... but

actionable deprivation," I would remand the fourteenth amendment claim for trial.

I should also note that I do not share the majority's confidence that an unreasonable repossession conducted by state officers is not actionable under the fourth amendment. The majority fears that recognizing the Soldals' fourth amendment claim would thwart the Supreme Court's "efforts to set limits on constitutional claims of procedural irregularities . . . because every deprivation of property without due process of law would be redescribed as a seizure of property in violation of the Fourth Amendment." *Supra* at 1250. The Court, however, seems less concerned with limiting procedural due process claims, and the fourth amendment, than does the majority. As Judge Posner acknowledges, the Court left this question open in *Fuentes;* even more instructive, in *Fuentes* the Court explicitly premised its reserve on the condition that a preseizure hearing take place. *See* 407 U.S. at 96 n. 32, 92 S.Ct. at 2002 n. 32 ("once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated."). The Court again declined to address whether the plaintiff had a fourth amendment claim in *Zinermon,* but did point to the fourth amendment specifically as a ground that would support a § 1983 action even if state remedies to redress a deprivation were available. *See* 110 S.Ct. at 983 & n. 12. In light of the Court's language of reservation, I am reluctant to attribute to it a position that would limit fundamental constitutional rights like those encompassed in the fourth amendment.

"The strictures of the Fourth Amendment . . . have been applied to the conduct of governmental officials in various civil activities." *O'Connor v. Ortega,* 480 U.S. 709, 714, 107 S.Ct. 1492, 1496, 94 L.Ed.2d 714 (1987) (plurality opinion). Granted, the judicial process required to make the state's seizure of property in the course of a civil proceeding comport with the fourth amendment differs from that required in a criminal investigation. *See, e.g., Murray's Lessee v. Hoboken Land and Improvement Co.,* 59 U.S. (18 How.) 272, 285, 15 L.Ed. 372 (1856); *Founding Church of Scientology v. United States,* 409 F.2d 1146, 1150 (D.C.Cir.) (Wright, J.), *cert. denied,* 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969). But that is not to say that the amendment does not impose some minimum requirements to protect citizens from unlawful intrusions in the course of civil proceedings, whether the government institutes the action directly or whether it is acting at the behest of private parties. It does. *See, e.g., Specht v. Jensen,* 832 F.2d 1516 (10th Cir.1987); *United States v. Device More or Less Labeled Theramatic,* 641 F.2d 1289 (9th Cir.1981); *United States v. Articles of Hazardous Substance,* 588 F.2d 39, 43 (4th Cir.1978); *Founding Church of Scientology, supra; Dawes v. Philadelphia Gas Commission,* 421 F.Supp. 806, 824 (E.D.Pa.1976); *Miloszewski v. Sears Roebuck & Co.,* 346 F.Supp. 119 (W.D.Mich.1972); *Laprease v. Raymours Furniture Co.,* 315 F.Supp. 716 (N.D. N.Y.1970) (three-judge court); *cf. Wyman v. James,* 400 U.S. 309, 318, 91 S.Ct. 381, 386, 27 L.Ed.2d 408 (1971) (home visits by caseworker did not violate fourth amendment because they were not unreasonable); *Benigni v. City of Hemet,* 879 F.2d 473, 477 (9th Cir.1988) (fourth amendment applies to harassing "inspections" by police of a local bar); *Harris v. City of Roseburg,* 664 F.2d 1121, 1127 (9th Cir.1981) (upholding § 1983 action when police assisted an unlawful eviction but not specifying the source of the constitutional violation).

The majority would confine operation of the fourth amendment to "law enforcement activities," a term that presumably encompasses civil proceedings instituted by the government, but not those instituted by private parties. Whether the government conducts a search or seizure for private or public ends, however, is but a factor bearing on the reasonableness of its action; it does not obviate the need to make the fourth amendment inquiry. *Cf. Ortega,* 480 U.S. at 730–31, 107 S.Ct. at 1504 (Scalia, J., concurring) (whether search is conducted by police or government employer does not affect availability of fourth amendment protection; identity of government actor is relevant only to purpose and reasonableness). In either case, the government participation is just as real. By the majority's logic, an individual the police suspect of illegality, but against whom they have an insufficient quantum of cause to arrest, or to search or seize property, is entitled to greater constitutional protection against unlawful seizures than one against whom the police harbor no suspicions at all. A suspected malfeasor would have a § 1983 action, but a completely innocent victim of a governmental invasion would not.

The Supreme Court rejected a similar approach when it held the fourth amendment applicable to administrative searches in *Camara v. Municipal Court,* 387 U.S. 523, 530–31, 87 S.Ct. 1727, 1731–32, 18 L.Ed.2d 930 (1967). The Court observed that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior" for "even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority. . . ."; *see also Wyman,* 400 U.S. at 317, 91 S.Ct. at 386 ("one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior"); *Go-Bart Co. v. United States,* 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374 (1931) (The fourth amendment "is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent. . . ."). The anomaly is particularly graphic in the majority's opinion, which affirms Soldal's § 1983 action for false arrest while denying his right to sue for the wrongful seizure of (and damage to) his trailer the day before, and where both actions stem from the same *property* dispute.

Reasonableness, which is the linchpin of the fourth amendment inquiry in all other contexts, should govern in this one as well. "A determination of the standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Ortega,* 480 U.S. at 719, 107 S.Ct. at 1498 (quoting *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Camara,* 387 U.S. at 536–37, 87 S.Ct. at 1735). When, as here, there is no significant legitimate governmental interest at stake, the alleged government action is patently unreasonable. I agree that there is little "to be gained by turning *every* repossession by state officers into a Fourth Amendment case," but neither do we gain by completely restricting the scope of constitutional protection to cases in which the government suspects one of illegal activity. Certainly, the fourth amendment should not bar every repossession or other type of governmental seizure, but it should be applied to those that, like the one alleged here, are clearly arbitrary and unreasonable.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael SCHMIDT, Defendant-Appellant.

No. 90-1070.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 5, 1990.

Decided Jan. 30, 1991.

The government filed a proceeding to determine whether a naturalized citizen's citizenship should be revoked due to his service as an armed guard at a Nazi concentration camp. The United States District Court for the Northern District of

APPENDIX C

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	CHARLES P. KOCORAS	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	88 C 7654	Date	November 3, 1989
Case Title	SOLDAL -v- COUNTY OF COOK et al		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☒ Judgment is entered as follows: (2) ☐ [Other docket entry:]

Pursuant to Memorandum Opinion entered this day, defendants Wittsman, Levy, Hunt, Jones, Vaid, Peterson and Giovanni's motion for summary judgment is granted and the action is dismissed as to all defendants.

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due _____.
(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____
(6) ☐ Hearing ☐ Ruling on _____ set for _____ at _____
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____
(9) ☐ Trial ☐ set for ☐ reset for _____ at _____
(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____
(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to
☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a) (1) ☐ FRCP 41(a)(2)
(12) ☒ (For further detail see ☐ order on the reverse of ☒ order attached to the original minute order form.)

	No notices required.		number of notices
✓	Notices mailed by judge's staff.		date docketed
	Notified counsel by telephone.		docketing dpty. initials
	Docketing to mail notices.	NOV 3 1989	date mld notices
	Mail AO 450 form.		mailing dpty. initials
	Copy to judge/magistrate.		
	courtroom deputy's initials ✓	Date/time received in central Clerk's Office	

Document #

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD SOLDAL, MARY SOLDAL, individually and as legal guardians for JIMMY SOLDAL, ALENA SOLDAL, JOSEPH SOLDAL and JESSIE SOLDAL, Plaintiff,	)	
v.	)	No. 88 C 7654
COUNTY OF COOK, a municipal corporation, LIEUTENANT JONES, OFFICER HARITOS, OFFICER HUNT, OFFICER VAID, CAPTAIN LEVY, CHIEF WITTSMAN, OFFICER DOE, OFFICER POE, JEFFREY PETERSON, KIMBERLY GIOVANNI, MARGARET CELESKI, MARGARET HALE and TERRACE PROPERTIES, Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the court on a motion for summary judgment by Defendants Wittsman, Levy, Hunt, Jones, Vaid, Peterson and Giovanni. For the following reasons, the motion is granted and the action is dismissed as to all defendants.

BACKGROUND

This case derives from the eviction of the plaintiffs' mobile home by the owners of a trailer park and two subsequent related incidents. Plaintiffs Edward Soldal and his family have pled the facts comprising these events as having infringed their federal constitutional rights through the cooperation of various members of the Cook County Sheriff's Police. There are also various pendent state law claims.

The undisputed facts are as follows: Prior to the events giving rise to this litigation, the plaintiffs resided in a mobile home on a lot which they rented from Defendants Terrace Properties, Inc. and Margaret Hale, the manager of Willoway Terrace trailer park. However, there were disagreements over the rent due and Hale, acting on behalf of Terrace Properties, sought to evict the plaintiffs from the park.

In May, 1987, Terrace Properties and Hale filed an eviction proceeding in state court. This proceeding was dismissed on June 2, 1987.

In August of 1987, Terrace Properties and Hale filed a second eviction proceeding. The hearing date for this action was scheduled for September 22, 1987. Terrace Properties and Hale, however, did not wait for their court date.

On September 4, 1987, agents of Terrace Properties removed the plaintiffs' trailer from its lot. Hale telephoned the Cook County Sheriff's Police and requested the presence of an officer in order to stave off any disturbance arising from the eviction. Captain Jackson sent deputy sheriff O'Neill and Lieutenant Jones to the trailer park with instructions to "stand by and maintain

the peace." There apparently was a particular fear of violence arising out of the dispute because, to quote the police report, "[t]he owner of the trailor [sic] Edward Soldal, had been the subject of prior calls to the park."

When Jones arrived at the park he attempted to ascertain Hale's reason and justification for moving the plaintiffs' trailer without their consent. Hale first led Jones to believe that the eviction was being accomplished pursuant to a court order. Hale, however, could not produce an eviction notice. Instead, she told Jones that "Mr. Soldal was over four months delinquent in his rent and they were going to move the trailer off the park grounds." Jones then called headquarters and, after inquiries were made, discovered that the possession dispute was currently pending in state circuit court and the next hearing date was on the 22nd of September. Jones then informed Halet that, because there was no eviction notice, the attempted removal of the plaintiffs' trailer was merely a civil dispute in which the police could not intervene.

Deputy O'Neill, on the other hand, had proceeded to Lot 24, where agents of Terrace Properties were removing the plaintiffs' trailer. When asked by Mr. Soldal what was being done to his trailer, O'Neill responded that he was there to make sure that Soldal did not interfere with the workers, and that he was doing so pursuant to Chief Jackson's orders.

Soldal then left the scene to contact his lawyer. At this point there occurred a series of telephone conversations between Soldal's lawyer or Soldal himself and either Captain Levy or Chief Wittsman of the Sheriff's Police. In these conversations, either Wittsman or Levy at first stated that he knew nothing of deputy sheriffs being sent to Willoway Terrace, but later, apparently having checked into the matter, told Soldal's lawyer that if deputy sheriffs were indeed participating in an illegal eviction, they would be stopped and so would the eviction.

Soldal then proceeded back to the trailer site in an attempt to sign a complaint against Terrace Properties and Hale for criminal trespass. Soldal was told to discuss the matter with Lieutenant Jones who was in Willoway's office. When Jones heard that Soldal wished to file a criminal complaint, he contacted a district attorney. The attorney, however, informed Jones that all the elements of a criminal trespass were not present and, thus, no criminal charges could be brought. Accordingly, Jones explained to Soldal that he could not take his complaint.

Once the plaintiffs' trailer was dislodged from its moorings, there arose the question of what to do with it. When Jones discovered that the Willoway management intended to deposit the trailer on the shoulder of a local intersection, he explained that this would not be permitted. In response, the management made arrangements to store the trailer next door at the Arrow Paving Company.

Jones further made sure that the plaintiffs were provided with a place to stay. Arrangements were made for Soldal, his wife and four children to stay at a local motel for four nights at the Willoway Terrace's expense. Mr. Soldal, however, had made arrangements with another tenant at Willoway Terrace to let his two older children stay over night in the tenant's trailer. Before Soldal left the park that night for the motel, Hale told him that he would not be allowed back in the park. Deputy sheriff Hunt then escorted Soldal, his wife and their two youngest children to the motel; Hunt led the way in his car while the Soldals followed.

Later that evening, Soldal went to the Elk Grove Village Police Station and again attempted to file a criminal complaint, this time against Arrow Construction Company for wrongfully detaining his trailer. Deputy sheriff Vaid came to see Soldal there, but explained that he could not accept the complaint because the trailer was only being stored there for safekeeping until other arrangements could be made and not to deprive Soldal of his property. Vaid did fill out a report, however.

The following day, September 5, 1987, Soldal returned to collect his remaining children. Hale saw Soldal enter the park and immediately telephoned the Sheriff's Police to complain of a trespass. Deputy sheriff Haritos investigated the matter and arrested Soldal for criminal trespass after finding him on the property of the trailer park. At that time, Soldal made no

mention of his status as an invitee of another tenant at the park. Soldal was handcuffed and jailed for several hours before being released. The charges were subsequently dropped.

On September 9, 1987, the plaintiffs obtained an order from the state judge assigned to the pending eviction proceeding, which required Terrace Properties to return the plaintiffs' trailer to its lot. Plaintiffs were placed back on Lot 24 in accordance with this order. Plaintiffs, however, were ultimately evicted per court order in December of 1987.

The final development in the case came on October 11, 1987, when Mr. Soldal was arrested yet again, this time by sheriff's deputy Vaid. The Sheriff's Police received a call from a Jeffrey Peterson, who also was a tenant of Willoway Terrace, complaining that Soldal had hit his car. When Vaid came to the park and attempted to sort the matter out with both men, Soldal accused Peterson of lying about the incident and invited him to "step out into the street." Vaid then arrested Soldal for criminal assault after Peterson indicated he desired to press charges. This charge was also ultimately dropped.

In response to these events, the Soldals brought the instant suit in September 1988. The original complaint contained nine counts; of those nine, seven remain. Count I alleges that all the members of the Sheriff's Police who were either present at Willoway Terrace or communicated with those who were present conspired with Hale and other agents of Terrace Properties to

evict the plaintiffs illegally, thus depriving the plaintiffs of their fourth and fourteenth amendment rights. Counts II and III allege that Soldal's arrests on September 5 and October 11, 1987, constituted part of the same conspiracy and also violated Soldal's fourth amendment right to be free from unreasonable seizures. Counts V, VI and V recast the arrests of September 5th and October 11th as pendent state-law claims for false arrest and imprisonment, and for malicious prosecution. Count IX alleges a tortious conspiracy to commit these very same state torts.

Defendants Levy, Wittsman, Hunt, Jones, Vaid, Peterson and Giovanni have now moved for summary judgment on the entire complaint. While Defendants Jackson and Haritos have a motion to dismiss pending before the court, the conclusions reached on the summary judgment motion make it unnecessary to address this second motion.

DISCUSSION

I. Legal Standard

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other materials show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one which might effect the outcome of the suit under applicable law. Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 248 (1986). No genuine issue exists "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Id. at 249. Summary judgment may be granted if the evidence is merely colorable or is not significantly probative. Id. at 249-50.

When a properly supported motion for summary judgment has been made, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." Id. The opposing party is entitled to the benefit of all favorable inferences which can reasonably be drawn from the underlying facts; however, only reasonable inferences will be drawn, not every conceivable inference. DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 329 (7th Cir. 1987).

II. Timeliness of the Motion

Plaintiffs first argue that the defendants' motion is premature because the plaintiffs have not yet taken any discovery. They argue that this lack of discovery is particularly harmful in a conspiracy case such as this one, where the key pieces of evidence tending to show that there was a conspiracy are in the hands of the alleged co-conspirators. And indeed, the general rule is that a party should usually be allowed to conduct discovery before being required to respond to a motion for summary judgment. See American Nurses Ass'n v. State of Illinois, 783 F.2d 716, 729 (7th Cir. 1986).

As defendants point out, however, this is by no means always the case. As the Seventh Circuit stated in American Nurses, the only case upon which the plaintiffs rely, there is no absolute right to discovery and a defendant may move for summary judgment at any time. Id. Moreover, it is particularly appropriate to deny discovery when the existing record demonstrates that the requested discovery is not likely to produce the facts necessary to defeat the motion.. E.g., Colan v. Prudential-Bach Securities, Inc., 577 F. Supp. 1074, 1084 (N.D. Ill. 1983). See also Paul Kadir, Inc. v. Sony Corp. of Am., 694 F.2d 1017, 1029-30 (5th Cir. 1983) (Rule 56(f) request properly denied when additional discovery is unlikely to produce necessary facts). Further, "[a] 'bare assertion' that the evidence supporting a plaintiff's allegations is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under rule 56(f)." Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981).

Applying these principles to this case, it is evident that the plaintiffs are not entitled to more time for discovery. First, the plaintiffs have not properly moved this court for an extension of discovery under Rule 56(f). To properly raise such a motion, the party opposing the motion must present an affidavit stating the reasons why his own testimony cannot raise genuine issues with respect to the facts alleged in the complaint. The

plaintiffs, however, have neither formally moved pursuant to Rule 56(f), nor filed an affidavit.

Second, the plaintiffs have already had ample time in which to obtain at least some evidence in support of their conspiracy claim. Although the plaintiffs' counsel points to the many other pressing matters before him, the fact is that absolutely no discovery has been taken to date. This, moreover, is in spite of the fact that the plaintiffs have known the nature of the defendants' motion for summary judgment since mid-August.

Finally, the plaintiffs provide no basis for the court to conclude that discovery would do the plaintiffs any good at this point. Aside from their "bare assertion" that the evidence lies with the defendants, which, as stated above, is patently insufficient, the only specific piece of discovery the plaintiffs mention is their desire to depose Captain Jackson because he was a "central figure" in the conspiracy. However, the only evidence linking Jackson to the case is the order he gave to deputy sheriff O'Neill to keep the peace during the events of September 4, 1987. Nothing at all indicates that Jackson was in any other way involved in the matter, nor do plaintiffs provide the court with any reason for believing Jackson to be so involved. The plaintiffs' proposed discovery at this juncture, therefore, would be nothing more than a frantic fishing expedition. Although such a liberal approach to discovery might be appropriate under Rule 26 discovery, a more specific need must be shown under Rule

56(f). See First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 298 (1968) ("discovery obtainable under Rule 56(f) to oppose a motion for summary judgment would normally be less extensive in scope than the general discovery obtainable under Rule 26").

III. Merits

The seven remaining counts in the plaintiffs' complaint fall into four groups. First, Count I, alleging fourth and fourteenth amendment violations based on the events of September 4, 1987, is in a class by itself because the existence of a conspiracy between the public and private parties is necessary to the very survival of the constitutional violations alleged within it. Second, Counts II and III, alleging fourth amendment violations with respect to Soldal's subsequent arrests, fall into a separate category in that they allege constitutional violations which do not depend on the existence of a conspiracy as to the public defendants, although a conspiracy is necessary to hold the private defendants liable. Third, Counts V, VI and VII, alleging pendent state tort claims of false arrest and imprisonment and malicious prosecution with respect to the arrests, raise very similar issues and, thus, will be discussed together. And fourth, Count IX, alleging a conspiracy to commit these very same state torts, like Count I, warrants a separate discussion.

A. Count I

Both sides appear to be slightly confused over the role that the plaintiff's conspiracy allegation plays in the constitutional claims contained in Count I. The fact is that a proven conspiracy between the public and private defendants is absolutely essential to the survival of Count I. Without a conspiracy, there is no state action and, thus, no implication of either the fourth or the fourteenth amendments.

In addition to 42 U.S.C. § 1983's requirement that the defendants have acted "under color of state law," both the fourteenth amendment and the fourth amendment, as applied to the states through the fourteenth amendment, have independent state action requirements. See, e.g., Rendell-Baker v. Kohl, 457 U.S. 830, 837 (1982) (state action required under fourteenth amendment's due process clause); United States v. Jacobsen, 466 U.S. 109, 113 (1984) (no violation of fourth amendment by purely private action). Without state action, therefore, there can be no infringement of these constitutional guarantees.

In this case, the actual eviction -- and thus the constitutional deprivations or injuries complained of -- were carried out by Hale and agents of Terrace Properties. While the plaintiffs claim that the Sheriff's Police participated in the eviction, by participation, they mean either through the alleged conspiracy, or because the police had a constitutionally-based legal duty to stop the eviction and did not. The second of these

two potential sources for state action will be examined first because the plaintiff's belief in a conspiracy in large measure stems from their position that the sheriff's police failed to intervene in what they knew was an illegal eviction.

The general rule is that there is no constitutional right to state services of whatever type. As the Supreme Court has recently stated: "[O]ur cases have recognized that the Due Process clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago County Dep't of Social Serv., 109 S. Ct. 998, 1003 (1989). In DeShaney, the Court made it clear that the only exception to this rule is "that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being." Id. at 1005. Writing for the Court, Justice Renquist explained that this "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." Id. at 1006. That state law may have created such a duty to act is irrelevant to the constitutional analysis. Id. at 1006-07.

Applying these principles to this case, it is obvious that the Sheriff's Police were under no federal constitutional obligation to stop the eviction. The requisite custody exception is wholly inapposite and the general rule, therefore, applies.

This leaves the alleged conspiracy as a source for state action. And while a state-law obligation to act may have been irrelevant for providing a direct constitutional duty to act under DeShaney, such a duty could provide circumstantial evidence of a conspiracy between the Sheriff's Police and the private defendants. To wit, if the Terrace Properties defendants were clearly committing a criminal trespass, why did the members of the Sheriff's Police who were present -- and who were called to the scene by the evicting defendants -- stand idly by and do nothing? A reasonable inference would be that they conspired with the private parties not to act.

The Sheriff's Police defendants, however, correctly point out that they were under no state-law duty to stop the eviction, and in fact were under an opposite duty to not intervene on either side unless some other infringement of the criminal code was committed. The underlying dispute in this case was one over possession of real property. The exclusive way to determine rightful possession is through the procedures provided in the Forcible Entry and Detainer Act, Ill. Rev. Stat. ch. 110, ¶¶ 9-101 to 9-321 (1987). These procedures, however, are wholly civil in nature. Thus, while ¶ 9-101 forbids a forcible entry by a

landlord, the tenant's sole remedy, absent the landlord's transgression of some provision of the criminal law, is to bring a restoration action under ¶ 9-102 of the Act. Indeed, the Illinois Appellate Court has explicitly held that a criminal trespass arrest and prosecution cannot be used as a means to determine the right to possession. People v. Evans, 163 Ill. App. 3d 561, 516 N.E.2d 817 (1st Dist. 1987).

This exclusivity rule applied in this case. The possession dispute between Terrace Properties and the Soldals was pending in the Circuit Court of Cook County on September 4, 1987. Thus, rightful possession was legally undetermined at that point. Given this fact, it was a legal impossibility for either party to commit a criminal trespass on the lot in question. Although Terrace Properties and Hale were likely guilty of a forcible entry on September 4, 1987 (indeed, the state court so found on September 9, 1987), this was not a matter for the Sheriff's Police.

In sum, the Sheriff's Police were under no duty of any kind to intervene on September 4, 1987. Thus, their failure to stop the eviction cannot constitute direct evidence of a constitutional deprivation, nor can it constitute evidence of a conspiracy between the public and private defendants which would thereby make the public defendants participants in the eviction.

It therefore remains to address the other potential evidence of a conspiracy to determine whether an issue of fact his been

sufficiently raised by the plaintiffs, who have not submitted any affidavits but, instead, have chosen to rely solely upon Mr. Soldal's deposition testimony. When this evidence is examined, however, it is clear that the plaintiffs have failed to raise a genuine issue over a conspiracy.

In addressing this issue, it is necessary to understand that a conspiracy among the Sheriff's Police alone does not solve the state action problem. If the various members of the Sheriff's Police did in fact conspire amongst themselves to not stop the eviction, there would still be no state action because no individual officer actually helped in the eviction. Thus, evidence of sheriff's police communicating with each other is not helpful to the plaintiffs, who must prove the existence of a conspiracy between the public and the private defendants.

In an attempt to show such a conspiracy, the plaintiffs rely on essentially three pieces of evidence: (1) that Chief Wittsman and Captain Levy were told of the activities of the deputies and attempted to conceal and refused to stop the actions of these deputies; (2) that Lieutenant Jones actively participated in the eviction by making arrangements with Hale as to storing the trailer and putting the Soldals up for the night; (3) and that Sergeant Hunt participated in the eviction by escorting the Soldals to their motel. However, the deposition testimony supporting this evidence does nothing to show an agreement between the Sheriff's Police defendants and the Terrace

Properties defendants to violate the Soldals' constitutional rights.

First, nothing in the testimony of the conversations with Wittsman and/or Levy indicates that they concealed anything or refused to stop illegal activity by sheriff's deputies. Soldal testified in his deposition that either Wittsman or Levy told Soldal and his lawyer that he was unaware that deputies were on the scene. There is no evidence of concealment here. Soldal goes onto testify that once the matter was checked into, either Wittsman or Levy assured his lawyer that any illegal conduct on the part of the deputies would be stopped. There is no evidence of a refusal to stop illegal activity here. With respect to the actual failure to stop illegal activity on the part of the sheriff's deputies present, as stated before, there was no illegal activity because there was no duty to act. Further, there is no allegation that either Wittsman or Levy spoke to the Terrace Properties defendants. Thus, there is no public-private link that can be inferred from this evidence.

Second, the testimony and the police report concerning the activities of Lieutenant Jones also fail to show a public-private conspiracy; indeed this evidence tends to negate the presence of a conspiracy. The undisputed facts show that Jones spent a good deal of time on September 4, 1987 with Hale, the manager of Willoway Terrace. Thus, a public-private link is present here. But the substance of the communications shows that, far from

conspiring with Hale to evict the Soldals, Jones was simply doing his best to make certain they were treated fairly by Hale and Terrace Properties. As stated earlier, Jones could not have intervened on the Soldals' behalf under the circumstances; even though Terrace Properties had no court order for their action, it still did not constitute criminal trespass -- only a civil wrong. Thus, the fact that Jones made sure the trailer was stored safely instead of left on the shoulder of the road and that the Soldals had a four-night pre-paid stay in a motel are completely inapposite to a conspiracy to deprive the Soldals of their property.

Third, the testimony concerning Hunt's having escorted the Soldals to the motel by leading the way is irrelevant to the alleged conspiracy. There certainly is no allegation that the Soldals were forced to stay in the motel or that Hale wished the Soldals to be escorted to the motel.

Fourth, although the plaintiffs do not explicitly argue the point in their response, their factual statements highlight Jones's and, later, deputy sheriff Vaid's refusal to take Mr. Soldal's complaints. One could argue that these refusals constitute evidence of a conspiracy by showing an unjustified protection of a co-conspirator. The circumstances of these refusals do not bear this conclusion out, however. To begin with, only the first complaint was directed at Hale and Terrace Properties. The second complaint was directed at the neighboring

construction company that had agreed to store the Soldal's trailer for safekeeping. A refusal to accept this complaint obviously could not be relevant to a conspiracy between the Sheriff's Police and the Terrace Properties defendants because Arrow Paving is not an alleged co-conspirator. Moreover, Jones had no choice but to refuse the first complaint: the district attorney had informed Jones that the elements of criminal trespass were not all present. This was not a surprising conclusion in light of this court's earlier discussion of the legal effect of the ongoing dispute in state court over the right of possession.

Perhaps the only piece of concrete evidence that supports the conspiracy concept at all is that Hale invoked the aid of the Sheriff's Police before beginning the eviction. But the Seventh Circuit has clearly indicated that "[a] private person does not conspire with a state official merely by invoking an exercise of the state official's authority." Tarkowski v. Koert-Barlett Realty Co., 644 F.2d 1204, 1208 (7th Cir. 1980).

In short, there is absolutely no evidence supporting a conspiracy between the sheriff's police and the Terrace Properties defendants. Because of this, all the constitutional allegations in Count I must fail due to a lack of state involvement. Moreover, without the presence of state action, Count I, of necessity, must also fail as to the private

defendants. Count I, therefore, must be dismissed in its entirety.

B. Counts II and III

Counts II and III allege fourth amendment violations as to all defendants. Count II alleges that the September 5th arrest of Soldal for criminal trespass was an unreasonable seizure because he was arrested without probable cause. Count III alleges the same legal conclusion with respect to Soldal's arrest for criminal assault on October 11, 1987.

At the outset, a brief word is in order as to how the conspiracy allegations and the conclusion reached in Part IIIA of this opinion fit into Counts II and III. To start with, the lack of a conspiracy between the public and private defendants as discussed in Part A of this opinion necessarily negates a violation of the fourth amendment by Hale or Terrace Properties. Again, without the public-private conspiracy, these private parties, who did not arrest or "seize" Soldal, cannot have violated the fourth amendment. This also goes for Defendants Peterson and Giovanni, who were never tied into the conspiracy in any case. The same, however, cannot be said for the arresting officers. Regardless of a conspiracy, these officers acted under color of state law and thus constituted state action when they made these arrests. The merits of Counts II and III, therefore, must be reached. Moreover, it should also be noted that Part

IIIA of this opinion did not reject the possibility of a conspiracy amongst the Sheriff's Police, which could expand this potential fourth amendment liability to officers who did not actually make the arrests. Notwithstanding, given the conclusions reached as to the merits of the remaining issues in the case, the existence of this "second" potential conspiracy need not be reached.

The law applicable to both Counts II and III is the same: it is well-established that an arrest based upon probable cause is a reasonable seizure under the fourth amendment. Moreover, the Seventh Circuit has glossed the meaning of probable cause in a way that is directly applicable to this case. In McKinney v. George, 726 F.2d 1183 (7th Cir. 1984), the court stated:

> If policemen arrest a person on the basis of a private citizen's complaint that if true would justify the arrest, and they reasonably believe it is true, they cannot be held liable for a violation of the Constitution merely because it later turns out that the complaint was unfounded. . . . If the police have probable cause, the arrest is lawful; and they have probable cause if they believe, with reason, that their informant was telling the truth.

Id. at 1187. Although the issue of whether or not there was reasonable suspicion or reasonable belief, i.e., probable cause, is usually a question for the jury in a civil action under § 1983, the Seventh Circuit has long held that, '"[w]here there

is no conflict in evidence, the court may make its own legal determination of probable cause.'" Llaguno v. Mingey, 739 F.2d 1186, 1190 (7th Cir. 1984) (quoting Garris v. Rowland, 678 F.2d 1264, 1268 (5th Cir.), cert. denied, 459 U.S. 864 (1982)). The rule dates from the Seventh Circuit's decision in Banish v. Locks, 414 F.2d 638 (7th Cir. 1969), and is based on the pre-existing rule as it applies to the tort of false arrest and imprisonment, where probable cause is also a defense. Id. at 641.

1. Count II -- September 5, 1987

On September 5, 1987, the Sheriff's Police were called to Willoway Terrace by Hale to investigate a criminal trespass. Deputy sheriff Haritos arrested Soldal for that crime after Soldal was found on the grounds in another tenant's trailer with his two older children. Deputy sheriff Hunt was also present. Hale explained that Soldal had been evicted the day before and given notice not to return; she also expressed a desire to press charges and signed a complaint to this effect.

Applying the rules articulated above, it is apparent that Haritos had probable cause to arrest Soldal. The elements of criminal trespass are, in relevant part: (1) entering upon the land of another, (2) "after receiving notice from the owner or occupant that such entry is forbidden . . . ." Ill. Rev. Stat. ch. 38, ¶ 21-3(a) (1987). Based on what Haritos saw himself and

the information he received from Hale, these elements were met and the arrest was appropriate.

The plaintiffs nonetheless argue that the arrest was unreasonable because there was no probable cause to believe there had been a criminal trespass. Specifically, they argue: (1) Soldal had as much right to be on the property as Terrace Properties because the possession issue had not yet been resolved by the state trial court (in other words, the same reason that criminal trespass charges could not be filed against Hale and Terrace Properties on the preceeding day); and (2) Soldal was immune from criminal trespass at the time because he was the invitee of another tenant who had put up Soldal's two older children for the night. These arguments must both fail, however.

The first argument is not even applicable to Soldal's arrest. As the defendants correctly point out, Soldal was not arrested for entering the lot over which there was a possessory dispute; nor does Soldal contend that he was attempting to reach this lot. Instead, Soldal admits he entered the park solely to visit another tenant, and that he did so after he had been given notice to stay away.

The second argument, though relevant to the merits of the criminal trespass issue, do not negate probable cause. The key here is what deputy sheriff Haritos knew at the time he made the arrest. And while Soldal's status as an invitee of a Willoway Terrace tenant would certainly have constituted a valid defense

to a charge of criminal trespass, there is no indication that Haritos knew of this status at the time. In this regard, Soldal admits he said nothing to Haritos at the time. Of course, the fact that Haritos found Soldal in another's trailer was related to his potential status as an invitee, but Haritos had no knowledge of whether he entered the park as an invitee or just what the circumstances were. The fourth amendment does not require every arrest to be correct, only supported by probable cause.

In short, while there was some indication that Soldal may not have been engaged in criminal trespass on September 5, 1987, it was not sufficient to destroy the initial probable cause to arrest. As the McKinney court made clear, whether the arrest was actually made upon a person guilty of the charge is irrelevant to the fourth amendment; the test is whether, at that moment, there was reasonable suspicion to believe a crime had been committed. The arresting officers made a judgment call based on the facts before them and this court finds that judgment to have been reasonable.

2. Assault - October 11, 1987

On October 11, 1987, the sheriff's police were called by Jeffrey Robinson, who complained that Soldal -- now re-established on his lot -- had struck his car and then left the scene. Sheriff's deputy Vaid came to Willoway Terrace to

investigate the matter. After getting the two men together to discuss what had occurred, Soldal called Robinson a liar and invited him to the equivalent of trial by combat. Robinson indicated he wished to press charges for criminal assault and Vaid arrested Soldal. The charge was subsequently dropped.

Again, the undisputed facts show that there was probable cause to believe that a criminal assault had been committed. The legal standard is whether the complainant was "in reasonable apprehension of receiving a battery." Peterson explained that he considered Soldal's comments a threat and expressed a desire to press charges. Thus, Vaid was acting on Peterson's assertions as to how he felt about the challenge.

Plaintiffs argue that no reasonable basis to make the arrest existed because it should have been evident to Vaid that Peterson was not in reasonable apprehension of being hit. Apparently, the plaintiffs believe that Soldal would have had to move toward Peterson before the arrest could be considered reasonable.

Plaintiffs, however, again confuse the merits of the assault charge with the probable cause issue. Soldal admits that he called Peterson a liar and invited him to fight. He further admits that their argument was "heated." Vaid believed Peterson when he said he felt threatened by this conduct. Under these circumstances, the court finds Vaid's belief to have been reasonable.

Because probable cause existed as to both arrests, Counts II and III must also be dismissed.

C. Counts V, VI and VII - False Arrest and Imprisonment and Malicious Prosecution

Counts V, VI and VII recharacterize Soldal's arrests on September 5 and October 11, 1987, as pendent tort claims for false arrest and imprisonment, and for malicious prosecution. These counts, however, must be dismissed as well.

One element in both of these tort actions is that the arrest or legal proceeding have been instituted without probable cause. See e.g., Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985) (false arrest); Ritchey v. Makin, 71 Ill. 2d 470, 475, 376 N.E.2d 991, 993 (1978) (malicious prosecution). Given the court's findings of probable cause with respect to both arrests at issue in this case, Counts V, VI an VII must be dismissed as to all defendants.

D. Count IX - Conspiracy to Commit State Torts

Count IX alleges a conspiracy among all the named defendants to falsely arrest and imprison and maliciously prosecute the plaintiffs. Without even addressing any remaining conspiracy which may potentially exist after Part IIIA of this opinion, this count fails as a matter of law.

This court recently concluded that Illinois does not recognize a tort of conspiracy to commit a tort. Belkow v. Celotex Corp., No. 89 C 3049, slip op. at 9 (N.D. Ill. Sept. 20, 1989). In so holding, the court relied on the reasoning of the Seventh Circuit in Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 453 (7th Cir.), cert. denied, 459 U.S. 880 (1982), where the court stated: [T]here is no basis in common law thinking for a tort of conspiracy to commit a tort. If there is a conspiracy and it fails, there is no injury and hence no tort liability; if it succeeds, the damages are fully recoverable in an action on the underlying tort." The ruling in Belkow governs this issue and Count IX must be dismissed.

For all of the foregoing reasons, the moving defendants' motion for summary judgment is granted in full and the action is dismissed as to all defendants.

Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: NOV 3 98

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

United States District Court

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

EDWARD SOLDAL et al

V.

COUNTY OF COOK et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88 C 7654
Judge Kocoras

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to Memorandum Opinion entered this day, defendants Wittsman, Levy, Hunt, Jones, Vaid, Peterson and Giovannie's motion for summary judgment is granted and the action is dismissed as to all defendants.

3 November 1989
Date

H. STUART CUNNINGHAM
Clerk

(By) Deputy Clerk

U.S. GOVERNMENT PRINTING OFFICE: 1985—808 007

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RESPONSE REQUESTED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NO. 91-6516 (3)

EDWARD SOLDAL, et al.,

Plaintiff-Petitioner

vs.

COUNTY OF COOK, et al.,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD SOLDAL, et al.,	)	
	)	
Plaintiff-Petitioner,	)	
	)	
vs.	)	No. 91-6516
	)	
COUNTY OF COOK, et al.,	)	
	)	
Defendant-Respondents.	)	

NOTICE OF FILING

TO: JOHN L. STAINTHORP
PEOPLES LAW OFFICE
1180 N. Milwaukee Ave.
Chicago, IL 60622

PLEASE TAKE NOTICE that on February 11, 1992, I mailed for filing with the Clerk of the Court for the United States Supreme Court the Respondent's Brief In Opposition to the Petition for Writ of Certiorari, a copy of which is attached and served upon you by placing it in the United States mail at 500 Richard J. Daley Center, Chicago, Illinois 60602, postage prepaid on February 11, 1992.

JACK O'MALLEY
State's Attorney of Cook County

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Subscribed and Sworn to
before me this 11th day
of February, 1992.

_____
Notary Public

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STATEMENT OF FACTS

Although the facts as stated by the petitioner are essentially correct, there are several points that should be clarified. Contrary to the petitioner's assertions that the trailer park management "expected" that the plaintiff might try to resist the eviction, they only feared that a disturbance might occur. (R.56, Attachment C.) The Cook County Sheriff's Office dispatched an officer (Shawn O'Neill) to "standby to maintain peace" (R.56, Attachment C) rather than "agree(ing)...to ensure the moving of the mobile home was accomplished without any incidents". (Petitioner's brief p.5) Officer O'Neill was dispatched to maintain the peace should the need arise not, as the petitioner asserts, to assist in the eviction of the petitioner.

At the time that the petitioner came out of his house, Officer O'Neill was sitting in his squad car (R.56, Attachment E p.15) and he did not get out of it until he saw the petitioner approach the trailer park workers. The officer did not speak to the trailer park workers when they arrived at the trailer site. (R.56, Attachment E p.15) When asked by the petitioner what he was going to do about what the workers were doing, Officer O'Neill is alleged to have said that he was there to see that the plaintiff did not interfere with the workers.

There is nothing in the record to suggest that Officer O'Neill knew that the eviction was illegal at the time that he was dispatched, while at the trailer site or later. The report of Lieutenant Jones (R.56, Attachment C) clearly states that after Officer O'Neill arrived he determined that an eviction was taking place. At some point in time after Officer O'Neill arrived Lieutenant Jones came to the trailer park and asked the park manager if she had court approval for the eviction. Lieutenant Jones was told that indeed they did but when he checked for the notice, he found that there was none. Lieutenant Jones told the manager that a notice was required. Lieutenant Jones then contacted his office and had the court file checked and determined that the next court date was September 22, 1987, some 18 days later. (R.56, Attachment C)

While all of the foregoing was occurring the workers were preparing to remove the trailer from the lot. At approximately 1430 hours (2:30 p.m.) the petitioner came to the trailer park office, this being approximately one hour after Officer O'Neill had been dispatched.[1] The petitioner advised Lieutenant Jones that his attorney had told him to sign a criminal complaint against the park manager for criminal trespass to land. Lieutenant Jones contacted the Cook County State's Attorney's Office and spoke to an assistant state's attorney regarding the petitioner's request. Lieutenant Jones was advised by Assistant State's Attorney Crowley that in his opinion the elements were not present for the offense. Based upon that legal advice, Lieutenant Jones told the plaintiff that he would not take his complaint. (R.56, Attachment C)

Lieutenant Jones told the park manager that they would not be allowed to leave the trailer on the street after being told that

---

[1] The time of the occurrence is noted as 1330 hours or 1:30 p.m. in Lieutenant Jones' report.

that is what they intended to do. Lieutenant Jones was also told that the park management had arranged for a place for the plaintiff and his family to stay, including all of his children for four nights. (R.56, Attachment C)

There is no evidence in the record that any of the Cook County Sheriff's Police Officers had any knowledge that the park manager had not complied with the Illinois Forcible Entry and Detainer statute in her eviction of the petitioner until some time after the workers were in the process of removing the trailer.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.
THE FOURTH AMENDMENT DOES NOT APPLY TO THIS CASE

"The Fourth Amendment protects people, not places."

Katz v. U.S., 389 U.S. 349, 351, 88 S.Ct. 507, 511 (1967).

The appellate court below accepted that statement, ruling in part, that the touchstone of the Fourth Amendment is the protection of an individual's privacy and there was no violation of that privacy in this case. The incident involved was a garden variety landlord/tenant dispute which involved a trailer lot. The petitioner asserts that the relocation of his trailer from this lot by the private parties (the trailer park manager and employees) violated the Fourth Amendment's prohibition against unreasonable seizures. Although no evidence of a conspiracy was found by the District Court, the petitioner claims that there was one between

the trailer park personnel, specifically the manager, and all of the Sheriff's Police defendants, thus satisfying the requisite state action requirement. Petitioner's allegations are misplaced.

In Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928), this Court found that there was no Fourth Amendment violation in the overhearing of conversations taking place inside a telephone booth. A key point in the decision was that there had been no physical intrusion. However, the notion that a "trespass" was required was later rejected in Katz, supra. Katz overruled Olmstead by focusing on the privacy of the individual as the touchstone the Fourth Amendment sought to protect. "But, what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Katz, 389 U.S. at 351, 88 S.Ct. at 511. Because Katz's privacy was intruded upon, the Fourth Amendment was implicated and its mandates must be met before the "search" for and "seizure" of his conversation would be constitutional.

In Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984) the first question the Court said it had to address was whether or not the prisoner had a right of privacy entitling him to Fourth Amendment protection from an allegedly unreasonable search and seizure.

> The applicability of the Fourth Amendment turns on whether "the person invoking its protection can claim a 'justifiable', a 'reasonable', or a 'legitimate expectation of privacy' that has been invaded by government action." Id., 468 U.S. at 525, 104 S.Ct. at 3199.

The Hudson Court concluded that a prisoner has no legitimate expectation of privacy and therefore the Fourth Amendment does not afford them any protection from warrantless searches. Had the Court stopped there, the case would have little applicability here. But Hudson further claimed that personal, noncontraband property was seized and destroyed. The Court held that the same reasoning used with respect to the search issue applied with respect to the seizure issue.

> Assuming that the Fourth Amendment protects against the destruction of property, in addition to its mere seizure, the same reasons . . . apply with controlling force to seizures. . . . The Fourth Amendment does not protect against seizures in a prison cell . . . Id., 468 U.S. at 528, 104 S.Ct. at 3201 n.8. (emphasis added)

Since it was the privacy of the individual that decided the issue of whether or not there could be a Fourth Amendment seizure, then it must logically flow that it is privacy that the Fourth Amendment protects, not mere property. That, too, is what Katz held was protected, the individual's privacy.

In United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029 (1970), federal authorities detained two packages deposited in the United States mail while they conducted an investigation which led to a search warrant. Regarding the 29 hour "detention" of the packages to obtain the warrant, the Court said, in finding no Fourth Amendment violation, "The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the

magistrate was obtained." Id., 397 U.S. at 253, 90 S.Ct. at 1032. While limited to the facts of the case, Van Leeuwen reaffirms that it is the individual's privacy that the Fourth Amendment seeks to protect. In the petitioner's case, the "envelope" was moved but never opened.

With respect to the case at hand, the privacy right of the petitioner was never implicated. The trailer was never entered or searched. The trailer was relocated to a safe place, assumedly at the trailer park's expense, and lodging provided for them for some period of time. While not minimizing the inconvenience caused them, their trailer was not searched nor any of the contents taken. They had access to it and the contents. Their freedom to move about was not impaired although admittedly their ability to live in the trailer was hampered until it could be reconnected to utility service. If a classic Fourth Amendment seizure where destruction of property occurs is only actionable in state court (as in Hudson) why then is the same state court remedy in a relocation of property without destruction so repugnant to the petitioner? If, as the petitioner argues, the Fourth Amendment should apply to his situation should not a prisoner be entitled to equal protection from the intentional, wanton destruction of personal, non-contraband property?

Petitioner cites United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1967) to support his position that the Fourth Amendment applies; however, that case is different in two respects. First, it is a pure law enforcement case. While the Fourth Amendment is

not limited only to law enforcement situations, there is invariably some law enforcement nexus in the cases cited by the petitioner.

For example, in Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1966), a government inspector sought unconsented access into a person's dwelling to enforce housing code violations. In Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978) government agents (police and fire) made unconsented entries onto private property to conduct an arson investigation. Government agents sought unconsented entry into a business to look for OSHA violations in Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978). A school principal in New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985) made an unconsented search of a student's purse to enforce a school rule. In O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987) government agents searched the office of an employee on administrative leave in furtherance of an internal investigation. Agents acting on behalf of the government conducted "searches" of railroad employees to detect the presence of alcohol or drugs in Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 109 S.Ct. 1042 (1989). In other "non-law enforcement" cases the same nexus exists. Government agents sought the testing of employees for drugs in their urine for enforcement of employment rules in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989). In United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973) an IRS attorney was the subject of an internal investigation including video surveillance and phone taps. Government agents sought unfettered access to company books to

enforce federal regulations in C.A.B. v. United Airlines, 542 F.2d 394 (7th Cir. 1976). In Pfeil v. Rogers, 757 F.2d 850 (7th Cir. 1985) police officers made a warrantless entry onto private land because of a disturbance caused by a dog. Finally, in Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1979), cert. denied, 429 U.S. 1029 (1979) a government agency required certain employees to submit to tests for drugs or alcohol after an accident.

All of these cases have the following elements in common:

1. Direct action against the individual or company by a government agent at the behest of the government;

2. Invasion of personal or company privacy by the government agents; and,

3. The government action was for the purpose of enforcing some type of governmental law, rule or regulation.

In contrast to the above cases, the situation involving the petitioner was purely civil in nature. It was a property dispute between private parties. The trailer park felt they had a right to regain access to the trailer lot and the petitioner disagreed. The trailer park manager moved the trailer to gain access to the lot not to seize and maintain any control over the trailer, nor to enforce any governmental rule, regulation, ordinance or statute.

The second point of departure from Place, supra., is the nature of the seizure. The Place seizure was not a seizure for the purpose of moving something aside. The government agents wanted to invade the privacy of the person by searching the suitcase. They

obtained control of it and kept it from the owner for several days while waiting to obtain a search warrant. However, in the petitioner's case the trailer park employees had no interest in the trailer or its contents. The employees did not want to exert control over the trailer in order to later search it. They wanted their lot and to get it they had to move the trailer. The trailer was not impounded or held pending the payment of towing fees or until the resolution of a lawsuit. The petitioner had his possession interrupted for a few hours while the trailer was disconnected. Once removed from the trailer park, the petitioner had the freedom to do whatever he wished with it. As the en banc opinion states, ". . . not every interference with exclusive dominion and control over one's property is a seizure in the relevant sense because not every such interference compromises privacy." 942 F.2d at 1078. Such was the case here.

The petitioner scoffs at the notion that the existence of other remedies should act as a bar to a Fourth Amendment claim. He cites Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990) yet the portion quoted clearly states that overlapping state remedies are generally irrelevant to the question of a cause of action under §1983. (Petitioner's brief, p.15) The Court in Zinermon did not say they are never relevant. See for example Hudson, supra. at note 8. As the Zinermon Court explained, its holding in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961) was aimed at inadequate state laws or situations where there was a state remedy in theory but not in practice. "As was noted in Monroe, in many cases there

is 'no quarrel with the state law on the books,' (citation omitted). Instead, the problem is the way these laws are or are not implemented by state officials." Zinermon, supra. at 983. The petitioner has never asserted that he does not have a complete and full remedy available to him under state law to redress the moving of his trailer.

Nor does the petitioner's claim that a liberty interest has been infringed preclude the adequacy of post-deprivation remedies. The Court was confronted with that challenge in Zinermon and rejected a categorical distinction between liberty and property interests. "Thus, the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the Parratt rule." Zinermon, supra. at 987. Whether considered as property or liberty, the analysis is essentially the same. The State has created a statutory scheme for evictions which includes notice and a hearing. It also provides adequate state law remedies should those procedures not be followed. Assuming, arguendo, there was state action, the random unauthorized errors of the officials here could not have been foreseen or prevented. The adequacy of a post-deprivation remedy following Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) is sufficient.

As the en banc opinion noted, to make sense out of Hudson's conclusion with respect to the seizure of the inmate's property, that same conclusion needs to be made here. In Hudson it was the privacy that linked the Fourth Amendment to the property. No violations of privacy, no Fourth Amendment violation in the seizure

of that property. In fact, no privacy, no Fourth Amendment. That same dichotomy has arisen in this case and the en banc majority, following the Court's conclusion in Hudson, ruled that the Fourth Amendment did not apply.

As the en banc opinion suggests, to be able to recast evictions, repossessions and the like as Fourth Amendment cases would effectively nullify and render useless the line of cases from Parratt to Zinermon. It is difficult to conceive of any due process property deprivation that would not be a "seizure" under the broad reading given that term in the Fourth Amendment. Engaging in the Parratt/Zinermon analysis would become unnecessary. Imagine how far reaching such a concept would be. See for example Judge Easterbrook's concurring opinion, 942 F.2d at 1081.

Judge Posner questions whether the Fourth Amendment was ever meant to reach non-law enforcement activities. 942 F.2d at 1076 The Amendment's warrant clause seems to indicate that it contemplated a law enforcement context as does the use of the terms "search" and "seizure". Those words are usually applied to government activities related to law enforcement. To handle non-law enforcement situations, the civil disputes if you will, the Fourteenth Amendment was adopted with distinctively different wording, ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . . ." There must be some reason why two amendments which cover the same subject matter have such vastly different wording. A plausible explanation is that the Fourth Amendment was meant to protect against

government enforcement of rules, regulations and laws while the Fourteenth Amendment was meant to protect persons and property in a non-law enforcement context from arbitrary action by the States through their statutes and regulations. It is this Court that has to decide that issue. However, finding that the Fourth Amendment does not apply to this civil action does not diminish the protections afforded the petitioner; such a conclusion merely says the remedy for the wrong is in a state court, not federal.

Therefore, this is not a situation where the petitioner is being left without a remedy. The question is what remedy should he have. The petitioner is attempting to turn a routine property dispute into a federal case. It is not that he is without a remedy, its that he prefers a different remedy with potentially deeper pockets, and the prospect of awarded fees. Housing courts and State civil courts are meant for these type of cases, especially where there is no challenge to the adequacy of the statutory scheme but to a private party's failure to follow that scheme.

II.
THE OFFICERS' ACTIONS WERE NOT UNREASONABLE

Assuming, arguendo, there was state action, the officers' actions were reasonable. While it is true that no judicial order had issued, from the standpoint of the officers' conduct, (and isn't it their conduct that is at issue), their actions were not unreasonable. The Sheriff's Office received a routine request for assistance regarding the moving of a trailer. After Officer

O'Neill arrives he determines that an eviction is planned. Lieutenant Jones responds and questions the park manager about court approval and is told that they have such approval. Lieutenant Jones then checks for a notice and discovers that there isn't one. Further, he orders the court file checked and is informed that the next court date is approximately 18 days later.

After the foregoing has occurred, the petitioner appears and wants to sign a criminal trespass to property complaint. Lieutenant Jones then contacts the local prosecuting authority and is told by Assistant State's Attorney Crowley that the elements for that crime were not present. Lieutenant Jones, based upon the conversation with ASA Crowley, tells the petitioner that he will not take his complaint.

The police in this case have been placed in a "trick bag". They respond to a routine request for assistance in a civil dispute between private parties. Although the civil suit had not been settled there is no question that a dispute over who is entitled to possession of the trailer lot has occurred. One side has said they have a right to get it back and the other says they have the right to remain in possession. The police respond and do nothing but sit at the trailer site. Officer O'Neill does not physically intervene or threaten to arrest the petitioner if he does anything. Going beyond their duty, Lieutenant Jones checks to see if proper procedures have been followed. Subsequent to finding that they were not, he further finds that the local prosecutor says that no crime has occurred. In hindsight it would have been better for the

police to immediately leave the scene upon discovering there was no court order, abandoning their role as keeper of the peace, and return only if that peace was shattered.

Lieutenant Jones finds himself at the scene of a civil dispute with no crime. He is a law enforcement officer who has the authority to stop illegal criminal activity, of which there is none.[2] While moving the trailer without judicial approval is illegal, it is not a criminal offense. Lieutenant Jones, Officer O'Neill and the entire Sheriff's Office did not have any legal authority to order that the trailer be restored to its original state. An emergency Temporary Restraining Order, never sought by the petitioner, issued by a court could, but not the police.

The petitioner would prefer that the analysis of the situation be simplified; that because no judicial order was issued, an unreasonable seizure under the Fourth Amendment occurred. The petitioner takes too broad a step in making that conclusion. The determination of reasonableness is always fact driven. Given the perhaps unique circumstances, the officers acted reasonably and found themselves in a situation where, after legal consultation, they had no authority to take action.

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[2] "But the Sheriff's police . . . were under an opposite duty not to intervene on either side unless some infringement of the criminal code was committed . . . ." panel opinion (923 F.2d at 1245) quoting the District Court opinion.

III.
THERE WAS NO SUBSTANTIVE DUE PROCESS VIOLATION

The petitioner claims there was a violation of his substantive due process rights because "the deputy sheriffs partially destroyed their home." (Petitioner's Brief, p.25) First, no deputy sheriff ever touched or participated in moving the trailer. That was accomplished solely by employees of the trailer park. Secondly, there is no evidence to sustain the allegation that the trailer was partially destroyed. The hyperbole aside, the petitioner says that the trailer's skirting and canopy had been removed in order to remove the trailer and that in the course of moving the trailer some personal items were broken and a heater jarred loose. (R.56, Attachment E, pp.27 and 52) This is a far cry from wanton destruction for its own sake. Rather, it flowed from and was a natural consequence of moving the trailer. Common sense says that the trailer could not be moved without the skirting or canopy being removed. If some incidental damage was done, it is unfortunate, but far from wanton destruction. The consequential damage was part of the removal of the trailer and does not constitute a separate constitutional violation.

IV.
THERE WAS NO STATE ACTION

The original panel decision (923 F.2d 1241) discussed but never totally resolved the state action issue. The panel majority concluded, in spite of clear evidence to the contrary, that the failure of Officer O'Neill to take action against the trailer park

employees was effectively "preventing" the petitioner from exercising his statutory right to self-help. (923 F.2d 1247)[3] That, however, was not determinative in that the petitioner had charged a conspiracy so the question became whether there was one. That decision was never reached by the panel because the majority concluded it did not make any difference. "All this is terribly speculative, though, and in the end quite irrelevant. . . . Either way, the plaintiffs could not, at least as they have framed the case, obtain damages for the deprivation." 923 F.2d at 1248. The en banc decision however states:

> The deputy sheriffs prevented Soldal from exercising his right [to self-help], and while this by itself may not have made them actual participants in the eviction, the condition of the record (the case was dismissed on summary judgment) requires us, as the panel opinion explained, to assume that there was a conspiracy between the private and public defendants - that the deputy sheriffs joined Terrace Properties in a scheme to get rid of a pesky tenant, a troublemaker. 923 F.2d at 1247-48 at 942 F.2d 1075.

Yet, as previously noted, the panel opinion did not conclude that there was a conspiracy. If, as the respondents contend, their actions did not make them participants (which the en banc opinion

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[3] Lieutenant Jones' report unequivocally states that he talked to Assistant State's Attorney Dana Crowley about arresting the trailer park people for criminal trespass and was informed that the elements were not present. Curiously, the panel majority would have the police substitute their legal knowledge for the prosecutor's and failing to do so makes them active participants.

suggests is correct) and, as District Court Judge Kocoras found, there wasn't a conspiracy, then there was no basis for the court to consider the claim against the police respondents.

CONCLUSION

For all of the foregoing reasons, these respondents respectfully request that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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No. 91-6516

In The

Supreme Court of the United States

October Term, 1991

EDWARD SOLDAL, et ux.,

Petitioners,

vs.

COOK COUNTY, ILLINOIS

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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11/16/88	Partial motion to dismiss of defendants Hunt, Levy and Wittsman
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2/8/89	Answer of defendant Hunt to Counts VII and IX
3/21/89	Defendants Levy, Wittsman and Hunt's Motion for Summary Judgment and to Stay Discovery
9/7/89	Defendants Peterson and Giovanni's motion for summary judgment and to stay discovery
9/15/89	Answers of defendants Vaid and Jones

9/20/89	Plaintiffs' response to defendants' motion for summary judgment
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11/6/89	Ruling on summary judgment. Motion for summary judgment is granted as to all defendants and judgment is entered in favor of all defendants
12/4/89	Notice of appeal filed by all plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD SOLDAL, MARY SOLDAL individually and as legal guardians for JIMMY SOLDAL, ALENA SOLDAL, JOSEPH SOLDAL and JESSIE SOLDAL, Plaintiff [sic],	)	
v.	)	No. 88 C 7654
COUNTY OF COOK, a municipal corporation, LIEUTENANT JONES, OFFICER HARITOS, OFFICER HUNT, OFFICER VAID, CAPTAIN LEVY, CHIEF WITTSMAN, OFFICER DOE, OFFICER POE, JEFFREY PETERSON, KIMBERLY GIOVANNI, MARGARET CELESKI, MARGARET HALE and TERRACE PROPERTIES, Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the court on a motion for summary judgment by Defendants Wittsman, Levy, Hunt, Jones, Vaid, Peterson and Giovanni. For the following reasons, the motion is granted and the action is dismissed as to all defendants.

BACKGROUND

This case derives from the eviction of the plaintiffs' mobile home by the owners of a trailer park and two subsequent related incidents. Plaintiffs Edward Soldal and his family have pled the facts comprising these events as having infringed their federal constitutional rights through the cooperation of various members of the Cook County Sheriff's Police. There are also various pendent state law claims.

The undisputed facts are as follows: Prior to the events giving rise to this litigation, the plaintiffs resided in a mobile home on a lot which they rented from Defendants Terrace Properties, Inc. and Margaret Hale, the manager of Willoway Terrace trailer park. However, there were disagreements over the rent due and Hale, acting on behalf of Terrace Properties, sought to evict the plaintiffs from the park.

In May, 1987, Terrace Properties and Hale filed an eviction proceeding in state court. This proceeding was dismissed on June 2, 1987.

In August of 1987, Terrace Properties and Hale filed a second eviction proceeding. The hearing date for this action was scheduled for September 22, 1987. Terrace Properties and Hale, however, did not wait for their court date.

On September 4, 1987, agents of Terrace Properties removed the plaintiffs' trailer from its lot. Hale telephoned the Cook County Sheriff's Police and requested the presence of an officer in order to stave off any disturbance arising from the eviction. Captain Jackson sent

deputy sheriff O'Neill and Lieutenant Jones to the trailer park with instructions to "stand by and maintain the peace." There apparently was a particular fear of violence arising out of the dispute because, to quote the police report, "[t]he owner of the trailor [sic] Edward Soldal, had been the subject of prior calls to the park."

When Jones arrived at the park he attempted to ascertain Hale's reason and justification for moving the plaintiffs' trailer without their consent. Hale first led Jones to believe that the eviction was being accomplished pursuant to a court order. Hale, however, could not produce an eviction notice. Instead, she told Jones that "Mr. Soldal was over four months delinquent in his rent and they were going to move the trailer off the park grounds." Jones then called headquarters and, after inquiries were made, discovered that the possession dispute was currently pending in state circuit court and the next hearing date was on the 22nd of September. Jones then informed Halet [sic] that, because there was no eviction notice, the attempted removal of the plaintiffs' trailer was merely a civil dispute in which the police could not intervene.

Deputy O'Neill, on the other hand, had proceeded to Lot 24, where agents of Terrace Properties were removing the plaintiffs' trailer. When asked by Mr. Soldal what was being done to his trailer, O'Neill responded that he was there to make sure that Soldal did not interfere with the workers, and that he was doing so pursuant to Chief Jackson's orders.

Soldal then left the scene to contact his lawyer. At this point there occurred a series of telephone conversations between Soldal's lawyer or Soldal himself and either Captain Levy or Chief Wittsman of the Sheriff's Police. In these conversations, either Wittsman or Levy at first stated that he knew nothing of deputy sheriffs being sent to Willoway Terrace, but later, apparently having checked into the matter, told Soldal's lawyer that if deputy sheriffs were indeed participating in an illegal eviction, they would be stopped and so would the eviction.

Soldal then proceeded back to the trailer site in an attempt to sign a complaint against Terrace Properties and Hale for criminal trespass. Soldal was told to discuss the matter with Lieutenant Jones who was in Willoway's office. When Jones heard that Soldal wished to file a criminal complaint, he contacted a district attorney. The attorney, however, informed Jones that all the elements of a criminal trespass were not present and, thus, no criminal charges could be brought. Accordingly, Jones explained to Soldal that he could not take his complaint.

Once the plaintiffs' trailer was dislodged from its moorings, there arose the question of what to do with it. When Jones discovered that the Willoway management intended to deposit the trailer on the shoulder of a local intersection, he explained that this would not be permitted. In response, the management made arrangements to store the trailer next door at the Arrow Paving Company.

Jones further made sure that the plaintiffs were provided with a place to stay. Arrangements were made for Soldal, his wife and four children to stay at a local motel for four nights at the Willoway Terrace's expense. Mr.

Soldal, however, had made arrangements with another tenant at Willoway Terrace to let his two older children stay over night in the tenant's trailer. Before Soldal left the park that night for the motel, Hale told him that he would not be allowed back in the park. Deputy sheriff Hunt then escorted Soldal, his wife and their two youngest children to the motel; Hunt led the way in his car while the Soldals followed.

Later that evening, Soldal went to the Elk Grove Village Police Station and again attempted to file a criminal complaint, this time against Arrow Construction Company for wrongfully detaining his trailer. Deputy sheriff Vaid came to see Soldal there, but explained that he could not accept the complaint because the trailer was only being stored there for safekeeping until other arrangements could be made and not to deprive Soldal of his property. Vaid did fill out a report, however.

The following day, September 5, 1987, Soldal returned to collect his remaining children. Hale saw Soldal enter the park and immediately telephoned the Sheriff's Police to complain of a trespass. Deputy sheriff Haritos investigated the matter and arrested Soldal for criminal trespass after finding him on the property of the trailer park. At that time, Soldal made no mention of his status as an invitee of another tenant at the park. Soldal was handcuffed and jailed for several hours before being released. The charges were subsequently dropped.

On September 9, 1987, the plaintiffs obtained an order from the state judge assigned to the pending eviction proceeding, which required Terrace Properties to return the plaintiffs' trailer to its lot. Plaintiffs were

placed back on Lot 24 in accordance with this order. Plaintiffs, however, were ultimately evicted per court order in December of 1987.

The final development in the case came on October 11, 1987, when Mr. Soldal was arrested yet again, this time by sheriff's deputy Vaid. The Sheriff's Police received a call from a Jeffrey Peterson, who also was a tenant of Willoway Terrace, complaining that Soldal had hit his car. When Vaid came to the park and attempted to sort the matter out with both men, Soldal accused Peterson of lying about the incident and invited him to "step out into the street." Vaid then arrested Soldal for criminal assault after Peterson indicated he desired to press charges. This charge was also ultimately dropped.

In response to these events, the Soldals brought the instant suit in September 1988. The original complaint contained nine counts; of those nine, seven remain. Count I alleges that all the members of the Sheriff's Police who were either present at Willoway Terrace or communicated with those who were present conspired with Hale and other agents of Terrace Properties to evict the plaintiffs illegally, thus depriving the plaintiffs of their fourth and fourteenth amendment rights. Counts II and III allege that Soldal's arrests on September 5 and October 11, 1987, constituted part of the same conspiracy and also violated Soldal's fourth amendment right to be free from unreasonable seizures. Counts V, VI and V [sic] recast the arrests of September 5th and October 11th as pendent state-law claims for false arrest and imprisonment, and for malicious prosecution. Count IX alleges a tortious conspiracy to commit these very same state torts.

Defendants Levy, Wittsman, Hunt, Jones, Vaid, Peterson and Giovanni have now moved for summary judgment on the entire complaint. While Defendants Jackson and Haritos have a motion to dismiss pending before the court, the conclusions reached on the summary judgment motion make it unnecessary to address this second motion.

DISCUSSION

I. Legal Standard

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other materials show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one which might effect the outcome of the suit under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue exists "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* at 249. Summary judgment may be granted if the evidence is merely colorable or is not significantly probative. *Id.* at 249-50.

When a properly supported motion for summary judgment has been made, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* The opposing party is entitled to the benefit of all favorable inferences which can reasonably be drawn from the underlying facts; however, only *reasonable* inferences will be drawn, not every conceivable

inference. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir. 1987).

II. Timeliness of the Motion

Plaintiffs first argue that the defendants' motion is premature because the plaintiffs have not yet taken any discovery. They argue that this lack of discovery is particularly harmful in a conspiracy case such as this one, where the key pieces of evidence tending to show that there was a conspiracy are in the hands of the alleged co-conspirators. And indeed, the general rule is that a party should usually be allowed to conduct discovery before being required to respond to a motion for summary judgment. *See American Nurses Ass'n v. State of Illinois*, 783 F.2d 716, 729 (7th Cir. 1986).

As defendants point out, however, this is by no means always the case. As the Seventh Circuit stated in *American Nurses*, the only case upon which the plaintiffs rely, there is no absolute right to discovery and a defendant may move for summary judgment at any time. *Id.* Moreover, it is particularly appropriate to deny discovery when the existing record demonstrates that the requested discovery is not likely to produce the facts necessary to defeat the motion. *E.g., Colan v. Prudential-Bach Securities, Inc.*, 577 F. Supp. 1074, 1084 (N.D. Ill. 1983). *See also Paul Kadir, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 1029-30 (5th Cir. 1983) (Rule 56(f) request properly denied when additional discovery is unlikely to produce necessary facts). Further, "[a] 'bare assertion' that the evidence supporting a plaintiff's allegations is in the hands of the defendant is insufficient to justify a denial of a motion for summary

judgment under rule 56(f)." *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981).

Applying these principles to this case, it is evident that the plaintiffs are not entitled to more time for discovery. First, the plaintiffs have not properly moved this court for an extension of discovery under Rule 56(f). To properly raise such a motion, the party opposing the motion must present an affidavit stating the reasons why his own testimony cannot raise genuine issues with respect to the facts alleged in the complaint. The plaintiffs, however, have neither formally moved pursuant to Rule 56(f), nor filed an affidavit.

Second, the plaintiffs have already had ample time in which to obtain at least some evidence in support of their conspiracy claim. Although the plaintiffs' counsel points to the many other pressing matters before him, the fact is that absolutely no discovery has been taken to date. This, moreover, is in spite of the fact that the plaintiffs have known the nature of the defendants' motion for summary judgment since mid-August.

Finally, the plaintiffs provide no basis for the court to conclude that discovery would do the plaintiffs any good at this point. Aside from their "bare assertion" that the evidence lies with the defendants, which, as stated above, is patently insufficient, the only specific piece of discovery the plaintiffs mention is their desire to depose Captain Jackson because he was a "central figure" in the conspiracy. However, the only evidence linking Jackson to the case is the order he gave to deputy sheriff O'Neill to keep the peace during the events of September 4, 1987. Nothing at all indicates that Jackson was in any other

way involved in the matter, nor do plaintiffs provide the court with any reason for believing Jackson to be so involved. The plaintiffs' proposed discovery at this juncture, therefore, would be nothing more than a frantic fishing expedition. Although such a liberal approach to discovery might be appropriate under Rule 26 discovery, a more specific need must be shown under Rule 56(f). *See First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 298 (1968) ("discovery obtainable under Rule 56(f) to oppose a motion for summary judgment would normally be less extensive in scope than the general discovery obtainable under Rule 26").

III. Merits

The seven remaining counts in the plaintiffs' complaint fall into four groups. First, Count I, alleging fourth and fourteenth amendment violations based on the events of September 4, 1987, is in a class by itself because the existence of a conspiracy between the public and private parties is necessary to the very survival of the constitutional violations alleged within it. Second, Counts II and III, alleging fourth amendment violations with respect to Soldal's subsequent arrests, fall into a separate category in that they allege constitutional violations which do not depend on the existence of a conspiracy as to the public defendants, although a conspiracy is necessary to hold the private defendants liable. Third, Counts V, VI and VII, alleging pendent state tort claims of false arrest and imprisonment and malicious prosecution with respect to the arrests, raise very similar issues and, thus, will be discussed together. And fourth, Count IX, alleging

a conspiracy to commit these very same state torts, like Count I, warrants a separate discussion.

A. Count I

Both sides appear to be slightly confused over the role that the plaintiff's conspiracy allegation plays in the constitutional claims contained in Count I. The fact is that a proven conspiracy between the public and private defendants is absolutely essential to the survival of Count I. Without a conspiracy, there is no state action and, thus, no implication of either the fourth or the fourteenth amendments.

In addition to 42 U.S.C. § 1983's requirement that the defendants have acted "under color of state law," both the fourteenth amendment and the fourth amendment, as applied to the states through the fourteenth amendment, have independent state action requirements. *See, e.g., Rendell-Baker v. Kohl*, 457 U.S. 830, 837 (1982) (state action required under fourteenth amendment's due process clause); *United States v. Jacobson*, 466 U.S. 109, 113 (1984) (no violation of fourth amendment by purely private action). Without state action, therefore, there can be no infringement of these constitutional guarantees.

In this case, the actual eviction – and thus the constitutional deprivations or injuries complained of – were carried out by Hale and agents of Terrace Properties. While the plaintiffs claim that the Sheriff's Police participated in the eviction, by participation, they mean either through the alleged conspiracy, or because the police had a constitutionally-based legal duty to stop the eviction and did not. The second of these two potential sources for

state action will be examined first because the plaintiff's belief in a conspiracy in large measure stems from their position that the sheriff's police failed to intervene in what they knew was an illegal eviction.

The general rule is that there is no constitutional right to state services of whatever type. As the Supreme Court has recently stated: "[O]ur cases have recognized that the Due Process clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Serv.*, 109 S. Ct. 998, 1003 (1989). In DeShaney, the Court made it clear that the only exception to this rule is "that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being." *Id.* at 1005. Writing for the Court, Justice Renquist explained that this "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 1006. That state law may have created such a duty to act is irrelevant to the constitutional analysis. *Id.* at 1006-07.

Applying these principles to this case, it is obvious that the Sheriff's Police were under no federal constitutional obligation to stop the eviction. The requisite custody exception is wholly inapposite and the general rule, therefore, applies.

This leaves the alleged conspiracy as a source for state action. And while a state-law obligation to act may have been irrelevant for providing a direct constitutional duty to act under *DeShaney*, such a duty could provide circumstantial evidence of a conspiracy between the Sheriff's Police and the private defendants. To wit, if the Terrace Properties defendants were clearly committing a criminal trespass, why did the members of the Sheriff's Police who were present – and who were called to the scene by the evicting defendants stand idly by and do nothing? A reasonable inference would be that they conspired with the private parties not to act.

The Sheriff's Police defendants, however, correctly point out that they were under no state-law duty to stop the eviction, and in fact were under an opposite duty to not intervene on either side unless some other infringement of the criminal code was committed. The underlying dispute in this case was one over possession of real property. The exclusive way to determine rightful possession is through the procedures provided in the Forcible Entry and Detainer Act, Ill. Rev. Stat. ch. 110, ¶¶ 9-101 to 9-321 (1987). These procedures, however, are wholly civil in nature. Thus, while ¶ 9-101 forbids a forcible entry by a landlord, the tenant's sole remedy, absent the landlord's transgression of some provision of the criminal law, is to bring a restoration action under ¶ 9-102 of the Act. Indeed, the Illinois Appellate Court has explicitly held that a criminal trespass arrest and prosecution cannot be used as a means to determine the right to possession. *People v. Evans*, 163 Ill. App. 3d 561, 516 N.E.2d 817 (1st Dist. 1987).

This exclusivity rule applied in this case. The possession dispute between Terrace Properties and the Soldals was pending in the Circuit Court of Cook County on September 4, 1987. Thus, rightful possession was legally undetermined at that point. Given this fact, it was a legal impossibility for either party to commit a criminal trespass on the lot in question. Although Terrace Properties and Hale were likely guilty of a forcible entry on September 4, 1987 (indeed, the state court so found on September 9, 1987), this was not a matter for the Sheriff's Police.

In sum, the Sheriff's Police were under no duty of any kind to intervene on September 4, 1987. Thus, their failure to stop the eviction cannot constitute direct evidence of a constitutional deprivation, nor can it constitute evidence of a conspiracy between the public and private defendants which would thereby make the public defendants participants in the eviction.

It therefore remains to address the other potential evidence of a conspiracy to determine whether an issue of fact his [sic] been sufficiently raised by the plaintiffs, who have not submitted any affidavits but, instead, have chosen to rely solely upon Mr. Soldal's deposition testimony. When this evidence is examined, however, it is clear that the plaintiffs have failed to raise a genuine issue over a conspiracy.

In addressing this issue, it is necessary to understand that a conspiracy among the Sheriff's Police alone does not solve the state action problem. If the various members of the Sheriff's Police did in fact conspire amongst themselves to not stop the eviction, there would still be no state action because no individual officer actually

helped in the eviction. Thus, evidence of sheriff's police communicating with each other is not helpful to the plaintiffs, who must prove the existence of a conspiracy between the public and the private defendants.

In an attempt to show such a conspiracy, the plaintiffs rely on essentially three pieces of evidence: (1) that Chief Wittsman and Captain Levy were told of the activities of the deputies and attempted to conceal and refused to stop the actions of these deputies; (2) that Lieutenant Jones actively participated in the eviction by making arrangements with Hale as to storing the trailer and putting the Soldals up for the night; (3) and that Sergeant Hunt participated in the eviction by escorting the Soldals to their motel. However, the deposition testimony supporting this evidence does nothing to show an agreement between the Sheriff's Police defendants and the Terrace Properties defendants to violate the Soldals' constitutional rights.

First, nothing in the testimony of the conversations with Wittsman and/or Levy indicates that they concealed anything or refused to stop illegal activity by sheriff's deputies. Soldal testified in his deposition that either Wittsman or Levy told Soldal and his lawyer that he was unaware that deputies were on the scene. There is no evidence of concealment here. Soldal goes onto testify that once the matter was checked into, either Wittsman or Levy assured his lawyer that any illegal conduct on the part of the deputies would be stopped. There is no evidence of a refusal to stop illegal activity here. With respect to the actual failure to stop illegal activity on the part of the sheriff's deputies present, as stated before, there was no illegal activity because there was no duty to

act. Further, there is no allegation that either Wittsman or Levy spoke to the Terrace Properties defendants. Thus, there is no public-private link that can be inferred from this evidence.

Second, the testimony and the police report concerning the activities of Lieutenant Jones also fail to show a public-private conspiracy; indeed this evidence tends to negate the presence of a conspiracy. The undisputed facts show that Jones spent a good deal of time on September 4, 1987 with Hale, the manager of Willoway Terrace. Thus, a public-private link is present here. But the substance of the communications shows that, far from conspiring with Hale to evict the Soldals, Jones was simply doing his best to make certain they were treated fairly by Hale and Terrace Properties. As stated earlier, Jones could not have intervened on the Soldals' behalf under the circumstances; even though Terrace Properties had no court order for their action, it still did not constitute criminal trespass – only a civil wrong. Thus, the fact that Jones made sure the trailer was stored safely instead of left on the shoulder of the road and that the Soldals had a four-night pre-paid stay in a motel are completely inapposite to a conspiracy to deprive the Soldals of their property.

Third, the testimony concerning Hunt's having escorted the Soldals to the motel by leading the way is irrelevant to the alleged conspiracy. There certainly is no allegation that the Soldals were forced to stay in the motel or that Hale wished the Soldals to be escorted to the motel.

Fourth, although the plaintiffs do not explicitly argue the point in their response, their factual statements highlight Jones's and, later, deputy sheriff Vaid's refusal to take Mr. Soldal's complaints. One could argue that these refusals constitute evidence of a conspiracy by showing an unjustified protection of a co-conspirator. The circumstances of these refusals do not bear this conclusion out, however. To begin with, only the first complaint was directed at Hale and Terrace Properties. The second complaint was directed at the neighboring construction company that had agreed to store the Soldal's trailer for safekeeping. A refusal to accept this complaint obviously could not be relevant to a conspiracy between the Sheriff's Police and the Terrace Properties defendants because Arrow Paving is not an alleged co-conspirator. Moreover, Jones had no choice but to refuse the first complaint: the district attorney had informed Jones that the elements of criminal trespass were not all present. This was not a surprising conclusion in light of this court's earlier discussion of the legal effect of the ongoing dispute in state court over the right of possession.

Perhaps the only piece of concrete evidence that supports the conspiracy concept at all is that Hale invoked the aid of the Sheriff's Police before beginning the eviction. But the Seventh Circuit has clearly indicated that "[a] private person does not conspire with a state official merely by invoking an exercise of the state official's authority." *Tarkowski v. Koert-Barlett Realty Co.*, 644 F.2d 1204, 1208 (7th Cir. 1980).

In short, there is absolutely no evidence supporting a conspiracy between the sheriff's police and the Terrace

Properties defendants. Because of this, all the constitutional allegations in Count I must fail due to a lack of state involvement. Moreover, without the presence of state action, Count I, of necessity, must also fail as to the private defendants. Count I, therefore, must be dismissed in its entirety.

B. Counts II and III

Counts II and III allege fourth amendment violations as to all defendants. Count II alleges that the September 5th arrest of Soldal for criminal trespass was an unreasonable seizure because he was arrested without probable cause. Count III alleges the same legal conclusion with respect to Soldal's arrest for criminal assault on October 11, 1987.

At the outset, a brief word is in order as to how the conspiracy allegations and the conclusion reached in Part IIIA of this opinion fit into Counts II and III. To start with, the lack of a conspiracy between the public and private defendants as discussed in Part A of this opinion necessarily negates a violation of the fourth amendment by Hale or Terrace Properties. Again, without the public-private conspiracy, these private parties, who did not arrest or "seize" Soldal, cannot have violated the fourth amendment. This also goes for Defendants Peterson and Giovanni, who were never tied into the conspiracy in any case. The same, however, cannot be said for the arresting officers. Regardless of a conspiracy, these officers acted under color of state law and thus constituted state action when they made these arrests. The merits of Counts II and III, therefore, must be reached. Moreover, it should

also be noted that Part IIIA of this opinion did not reject the possibility of a conspiracy amongst the Sheriff's Police, which could expand this potential fourth amendment liability to officers who did not actually make the arrests. Notwithstanding, given the conclusions reached as to the merits of the remaining issues in the case, the existence of this "second" potential conspiracy need not be reached.

The law applicable to both Counts II and III is the same: it is well-established that an arrest based upon probable cause is a reasonable seizure under the fourth amendment. Moreover, the Seventh Circuit has glossed the meaning of probable cause in a way that is directly applicable to this case. In *McKinney v. George*, 726 F.2d 1183 (7th Cir. 1984), the court stated:

> If policemen arrest a person on the basis of a private citizen's complaint that if true would justify the arrest, and they reasonably believe it is true, they cannot be held liable for a violation of the Constitution merely because it later turns out that the complaint was unfounded. . . . If the police have probable cause, the arrest is lawful; and they have probable cause if they believe, with reason, that their informant was telling the truth.

Id. at 1187. Although the issue of whether or not there was reasonable suspicion or reasonable belief, i.e., probable cause, is usually a question for the jury in a civil action under § 1983, the Seventh Circuit has long held that, ' "[w]here there is no conflict in evidence, the court may make its own legal determination of probable cause.' " *Llaguno v. Mingey*,. 739 F.2d 1186, 1190 (7th Cir.

1984) (quoting *Garris v. Rowland*, 678 F.2d 1264, 1268 (5th Cir.), *cert. denied*, 459 U.S. 864 (1982)). The rule dates from the Seventh Circuit's decision in *Banish v. Locks*, 414 F.2d 638 (7th Cir. 1969), and is based on the preexisting rule as it applies to the tort of false arrest and imprisonment, where probable cause is also a defense. *Id.* at 641.

1. Count II – September 5, 1987

On September 5, 1987, the Sheriff's Police were called to Willoway Terrace by Hale to investigate a criminal trespass. Deputy sheriff Haritos arrested Soldal for that crime after Soldal was found on the grounds in another tenant's trailer with his two older children. Deputy sheriff Hunt was also present. Hale explained that Soldal had been evicted the day before and given notice not to return; she also expressed a desire to press charges and signed a complaint to this effect.

Applying the rules articulated above, it is apparent that Haritos had probable cause to arrest Soldal. The elements of criminal trespass are, in relevant part: (1) entering upon the land of another, (2) "after receiving notice from the owner or occupant that such entry is forbidden . . . . " Ill. Rev. Stat. ch. 38, ¶ 21-3(a) (1987). Based on what Haritos saw himself and the information he received from Hale, these elements were met and the arrest was appropriate.

The plaintiffs nonetheless argue that the arrest was unreasonable because there was no probable cause to believe there had been a criminal trespass. Specifically, they argue: (1) Soldal had as much right to be on the

property as Terrace Properties because the possession issue had not yet been resolved by the state trial court (in other words, the same reason that criminal trespass charges could not be filed against Hale and Terrace Properties on the preceeding [sic] day); and (2) Soldal was immune from criminal trespass at the time because he was the invitee of another tenant who had put up Soldal's two older children for the night. These arguments must both fail, however.

The first argument is not even applicable to Soldal's arrest. As the defendants correctly point out, Soldal was not arrested for entering the lot over which there was a possessory dispute; nor does Soldal contend that he was attempting to reach this lot. Instead, Soldal admits he entered the park solely to visit another tenant, and that he did so after he had been given notice to stay away.

The second argument, though relevant to the merits of the criminal trespass issue, do not negate probable cause. The key here is what deputy sheriff Haritos knew at the time he made the arrest. And while Soldal's status as an invitee of a Willoway Terrace tenant would certainly have constituted a valid defense to a charge of criminal trespass, there is no indication that Haritos knew of this status at the time. In this regard, Soldal admits he said nothing to Haritos at the time. Of course, the fact that Haritos found Soldal in another's trailer was related to his potential status as an invitee, but Haritos had no knowledge of whether he entered the park as an invitee or just what the circumstances were. The fourth amendment does not require every arrest to be correct, only supported by probable cause.

In short, while there was some indication that Soldal may not have been engaged in criminal trespass on September 5, 1987, it was not sufficient to destroy the initial probable cause to arrest. As the *McKinney* court made clear, whether the arrest was actually made upon a person guilty of the charge is irrelevant to the fourth amendment; the test is whether, at that moment, there was reasonable suspicion to believe a crime had been committed. The arresting officers made a judgment call based on the facts before them and this court finds that judgment to have been reasonable.

2. Assault – October 11, 1987

On October 11, 1987, the sheriff's police were called by Jeffrey Robinson, who complained that Soldal – now re-established on his lot – had struck his car and then left the scene. Sheriff's deputy Vaid came to Willoway Terrace to investigate the matter. After getting the two men together to discuss what had occurred, Soldal called Robinson a liar and invited him to the equivalent of trial by combat. Robinson indicated he wished to press charges for criminal assault and Vaid arrested Soldal. The charge was subsequently dropped.

Again, the undisputed facts show that there was probable cause to believe that a criminal assault had been committed. The legal standard is whether the complainant was "in reasonable apprehension of receiving a battery." Peterson explained that he considered Soldal's comments a threat and expressed a desire to press charges. Thus, Vaid was acting on Peterson's assertions as to how he felt about the challenge.

Plaintiffs argue that no reasonable basis to make the arrest existed because it should have been evident to Vaid that Peterson was not in reasonable apprehension of being hit. Apparently, the plaintiffs believe that Soldal would have had to move toward Peterson before the arrest could be considered reasonable.

Plaintiffs, however, again confuse the merits of the assault charge with the probable cause issue. Soldal admits that he called Peterson a liar and invited him to fight. He further admits that their argument was "heated." Vaid believed Peterson when he said he felt threatened by this conduct. Under these circumstances, the court finds Vaid's belief to have been reasonable.

Because probable cause existed as to both arrests, Counts II and III must also be dismissed.

C. Counts V, VI and VII – False Arrest and Imprisonment and Malicious Prosecution

Counts V, VI and VII recharacterize Soldal's arrests on September 5 and October 11, 1987, as pendent tort claims for false arrest and imprisonment, and for malicious prosecution. These counts, however, must be dismissed as well.

One element in both of these tort actions is that the arrest or legal proceeding have been instituted without probable cause. *See e.g., Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985) (false arrest); *Ritchey v. Makin*, 71 Ill. 2d 470, 475, 376 N.E.2d 991, 993 (1978) (malicious prosecution). Given the court's findings of probable cause

with respect to both arrests at issue in this case, Counts V, VI an VII must be dismissed as to all defendants.

D. Count IX – Conspiracy to Commit State Torts

Count IX alleges a conspiracy among all the named defendants to falsely arrest and imprison and maliciously prosecute the plaintiffs. Without even addressing any remaining conspiracy which may potentially exist after Part IIIA of this opinion, this count fails as a matter of law.

This court recently concluded that Illinois does not recognize a tort of conspiracy to commit a tort. *Belkow v. Celotex Corp.*, No. 89 C 3049, slip op. at 9 (N.D. Ill. Sept. 20, 1989). In so holding, the court relied on the reasoning of the Seventh Circuit in *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 453 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982), where the court stated: [T]here is no basis in common law thinking for a tort of conspiracy to commit a tort. If there is a conspiracy and it fails, there is no injury and hence no tort liability; if it succeeds, the damages are fully recoverable in an action on the underlying tort." The ruling in *Belkow* governs this issue and Count IX must be dismissed.

For all of the foregoing reasons, the moving defendants' motion for summary judgment is granted in full and the action is dismissed as to all defendants.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: NOV 3 1989

United States District Court
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

EDWARD SOLDAL et al

V.

COUNTY OF COOK et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88 C 7654
Judge Kocoras

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to Memorandum Opinion entered this day, defendants Wittsman, Levy, Hunt, Jones, Vaid, Peterson and Giovannie's motion for summary judgment is granted and the action is dismissed as to all defendants.

3 November 1989 — H. STUART CUNNINGHAM, *Clerk*

United States Court of Appeals,
Seventh Circuit.

Edward SOLDAL and Mary Soldal, individually and as legal guardians for Jimmy Soldal, Alena Soldal, Joseph Soldal and Jessie Soldal, Plaintiffs-Appellants,

v.

COUNTY OF COOK, et al., Defendants-Appellees.

No. 89-3631.

Argued Sept. 14, 1990.

Decided Jan. 24, 1991.

Before CUDAHY, POSNER, and FLAUM, Circuit Judges.

POSNER, Circuit Judge.

This matter is before us on the appeal of the plaintiffs, Edward Soldal and his family, from the dismissal of their civil suit (42 U.S.C. § 1983) on the defendants' motion for summary judgment. The defendants are Cook County, Illinois; several officers of the Cook County sheriff's office; Terrace Properties, which owns a trailer park in Elk Grove, Illinois; and Margaret Hale, the manager of the park, together with several other private individuals.

The Soldals had rented a lot in the park as a site for their trailer home, in which they lived with their four children. In August 1987, Terrace Properties filed a suit in an Illinois state court to evict the Soldals. A hearing was scheduled for September 22, but more than two weeks before then Hale called the Cook County sheriff's office to say that she was planning to evict a family that day

(September 4) and that, because she feared that the family might resist being evicted, she wanted deputy sheriffs to be present. That afternoon two employees of Terrace Properties came to the Soldals' trailer accompanied by a deputy sheriff. The employees began by wrenching the sewer and water boxes off the side of the trailer home, causing damage to it. When Soldal asked the workers what they were doing, they told him to ask the deputy sheriff, which he did, and the reply was that "he [the deputy sheriff] was there to see that [Soldal] didn't interfere with [Terrace's] workers." The workers tore off the skirting and canopy of the trailer and hooked a tractor to it. Although they also disconnected the phone, Soldal called his lawyer from a pay phone and she in turn called the sheriff's office – which at first denied that there was any deputy sheriff on the scene. Getting no satisfaction, the lawyer advised Soldal, in a second conversation from the pay phone, to file a complaint against Terrace Properties for criminal damage to his property.

When Soldal returned to the trailer from the pay phone, he found two more deputy sheriffs at the scene. He told them that he wanted to file a complaint and they referred him to a lieutenant of the sheriff's police, who was in Hale's office. Soldal went there, and the lieutenant came out and told him to wait outside, then went back in and remained closeted with Hale and several other employees of Terrace Properties for twenty to thirty minutes. When he emerged he told Soldal to talk to the district attorney, then went back into the office. Reemerging at the end of another half hour he told Soldal that he would not accept a complaint from him because "it was between the landlord and tenant . . . [and] they

were going to go ahead and continue to move out the trailer." The tractor now pulled the Soldals' trailer free from its moorings. Discussion about where it would be taken ensued, in the course of which Hale said to the lieutenant in Soldal's presence, "I'm going to tell him [Soldal] this in front of you [lieutenant], that he's not allowed to come back to the park," whereupon the lieutenant told Soldal, "Now, you heard what she said."

The Soldals went off to a motel for the night (Terrace Properties had offered to pick up the tab) but left two of their children with a friend who lived in another trailer home in the park. The next morning Soldal returned to the park to pick up the children. He was seen entering the park, and while he was in the friend's trailer a deputy sheriff (who had not been present at the eviction the previous day) came and arrested Soldal because "you're not supposed to be here." He was kept in jail for several hours, charged with criminal trespass. The charge was later dropped.

Soldal continued making unsuccessful efforts to get the sheriff's office to accept a complaint from him. He had better luck in court. On September 9 the state court in which the eviction proceeding was pending found that Terrace Properties had not been authorized to evict the Soldals, and ordered Terrace to put the trailer back on the lot. This was done, but the trailer had been badly damaged during the eviction.

A month later one of the deputy sheriffs who had been involved in the eviction came to the Soldals' trailer, together with a man named Peterson, who had accused Soldal of having struck his car and now repeated the

accusation. Soldal replied by accusing Peterson of lying and invited him to step out into the street. The invitation was not taken up but the deputy sheriff asked Peterson whether he wanted to press criminal charges, and when he said he did the deputy sheriff arrested Soldal. Soldal was charged with criminal assault, apparently based on the invitation to fight rather than on whatever earlier skirmishes led the police, with Peterson in tow, to his door. He was also charged with other crimes upon the complaint of two other private persons, who are named as defendants in this suit along with Peterson. But as there is no detail in the record concerning these additional charges and defendants, we ignore them except to note that the charges were later dropped, as was the charge of assaulting Peterson.

Our recital construes the facts as favorably to the plaintiffs as the record will permit. That is what we are supposed to do when deciding whether summary judgment should have been granted. Of course the true facts may turn out to be different and less favorable to the plaintiffs.

The complaint charges in effect two conspiracies. In the first, Terrace Properties and Margaret Hale are accused of conspiring with Cook County and the officers of the sheriff's police to damage the Soldals' trailer and to arrest him without cause. In the second, Peterson is accused of having conspired with Cook County and the officers (not all the same ones) to arrest Soldal a month later. Pendent counts recast the various claims as violations of state tort law as well. On the defendants' motion for summary judgment the district judge dismissed all the claims, both federal and state, on the merits. First of

all he found that there had been no conspiracy. True, there was a puzzle: "if the Terrace Properties defendants were clearly committing a criminal trespass, why did the members of the Sheriff's Police who were present – and who were called to the scene by the evicting defendants – stand idly by and do nothing? A reasonable inference would be that they conspired with the private parties not to act." But the sheriff's police "were under no state-law duty to stop the eviction, and in fact were under an opposite duty to *not* intervene on either side unless some other infringement of the criminal code was committed. . . . [A] criminal trespass arrest and prosecution cannot be used as a means to determine the right to possession. *People v. Evans*, 163 Ill.App.3d 561, [114 Ill.Dec. 662], 516 N.E.2d 817 (1st Dist.1987)." (Emphasis in original.) As for the two arrests, they were based, the district court concluded, on probable cause.

To recover damages for having been deprived of their property without due process of law, the Soldals must show first that there was a deprivation of property, and second that it was a deprivation by officers of the state. Only after these questions are answered in the affirmative does the question whether there was a denial of due process arise.

The physical damage that Terrace's workers did to the trailer was a deprivation of property. To establish this proposition we begin by noting that if the property had been completely destroyed, this would have been as much a deprivation as if it had been taken away. *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir.1983). Compare *United States v. General Motors Corp.*, 323 U.S. 373,

384, 65 S.Ct. 357, 362, 89 L.Ed.311 (1945), which establishes that proposition for takings cases. "Deprivation" is the state of being deprived of something, and therefore comes into being when the property is taken from the owner; what happens to the property – whether it is used by someone else or destroyed – is an irrelevance. Severe damage is a partial but, we think, an actionable deprivation. Although we can find no cases on the point, a persuasive analogy is that temporary deprivations frequently have been held actionable under section 1983, as in *Tavarez v. O'Malley*, 826 F.2d 671, 674 (7th Cir.1987). We cannot see a principled difference between a temporary deprivation on the one hand and damage that reduces the present value of the property to the owner by the same amount, on the other. No doubt, trifling diminutions of value may be disregarded as not rising to the level of deprivations; but that is not a consideration in this case.

But the workers who damaged the Soldals' trailer home were private employees. Only if they, or more plausibly their boss, Hale, were in cahoots with the deputy sheriffs involved in the eviction and arrest can the Soldals obtain a judgment against these private defendants. Of course, if the Soldals can get a judgment against the public defendants, then as a practical matter they do not need to be able to get a judgment against the private ones as well, since a plaintiff is not entitled to a duplicative recovery. The Soldals need not worry that the deputy sheriffs might be judgment-proof. The state will indemnify the deputy sheriffs against any judgment that might be entered, Ill.Rev.Stat. ch. 34, ¶ 5-1002; *Joseph v. Brierton*, 739 F.2d 1244, 1246 (7th Cir.1984), and this as a practical matter guarantees the collectibility of a judgment even if

Cook County is dropped as a defendant, as we think it must be for the reasons stated at the end of this opinion.

So why have the Soldals charged conspiracy? Why have they not proceeded just against the public defendants? The answer is that they must have been concerned, rightly or wrongly (wrongly as we shall see), that since a mere failure by police to prevent a private person from damaging the property of another is not actionable under the Constitution, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Soldals would not be able get a judgment against the public defendants, at least so far as the property damage inflicted during the eviction is concerned, unless they proved that the deputy sheriffs had conspired with the private defendants and hence were responsible for the acts of the private defendants committed in furtherance of the conspiracy.

So let us consider whether there is any basis for supposing that there was such a conspiracy. We begin by noting that the fact that a private person calls the police to a scene of expected violence – even the fact that he persuades the police to arrest someone – does not establish a conspiracy between the police and him. *Gramenos v. Jewel Cos.*, 797 F.2d 432, 435 (7th Cir.1986); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352-53 (7th Cir.1985); *Johnson v. Miller*, 680 F.2d 39, 40-41 (7th Cir.1982). A contrary conclusion would vastly expand the reach of federal civil rights law, not only by bringing a myriad of private individuals within the law's scope but also by bringing most police inaction within its scope as well. These consequences are a reason for not letting the concept of conspiracy expand to its logical limits. And the

concept itself would be deformed rather than completed by being interpreted to cover this most elementary of citizen-police interactions. A conspiracy is an agreement, and the police do not enter into an agreement with the complainant when they arrest a person upon his complaint, thereby doing their duty to enforce the law, or when they stand by at a scene of potential violence, hoping by their presence to deter a breach of the peace and in this case doing so successfully. As the cited cases explain, conspiracy comes in when private persons and public police agree to act jointly to achieve a commor. end, here the removal of a troublesome tenant – troublesome, perhaps, to the police as well as to the landlord, for quite apart from having been behind in his rent, Mr. Soldal is apparently a quarrelsome fellow.

One bit of indirect evidence of a conspiracy of this sort is that the deputy sheriffs – whose principal function after all is enforcing eviction orders – must have known that the trailer park had no right to evict the Soldals. To evict lawfully you need an eviction order, which Terrace Properties did not have. And the deputy sheriffs knew it did not have one. Terrace Properties had brought a proceeding to obtain such an order, but you cannot on the strength of filing a complaint proceed as if you had already won and obtained an order ready to be executed. All this is perfectly plain as a matter of Illinois law. As held in *People v. Evans, supra* – it is a mystery to us why the district judge cited this case, considering his conclusion – Illinois' Forcible Entry and Detainer Act, Ill.Rev.Stat. ch. 110, ¶¶ 9-101 *et seq.*, provides the exclusive remedy for recovering possession of land from a

tenant who is in actual and peaceable, although not necessarily rightful, possession of the plaintiff's property. The plaintiff can obtain a judgment of eviction against the overstaying tenant but until he does so he has no authority to dispossess the tenant. Terrace Properties obtained no judgment of eviction, either before it dispossessed the Soldals or afterward.

Why then did the deputy sheriffs not stop the eviction, and why did they not accept the criminal complaint that Soldal wanted to file against the landlord who was dispossessing him and his family unlawfully? *People v. Evans* does not hold or suggest that the police must stand by while people use violence to enforce their claims of legal right. In that case, a tenant refused to sign a lease. The landlord told her to get out. She refused. The police arrested her on the landlord's complaint for criminal trespass. The court said this was the wrong way to proceed. The landlord should have obtained an eviction order. That is exactly what Hale should have done.

Perhaps what the district judge had in mind in citing *Evans* is that Soldal, like the landlord in *Evans*, would not have been entitled to use self-help to prevent the removal and damage of his trailer. The deputy sheriff was on the scene to prevent him from exercising that self-help. But the situations are not symmetrical. Joyce Evans was sitting quietly in the house she had rented. She was not breaking things. There was no occasion to use force against her. Terrace's employees were destroying valuable property of the Soldals. Soldal would have been within his common law (now statutory) right of self-help to use mild force – force not intended or likely to cause an actual physical injury – to prevent that destruction.

M'Ilvoy v. Cockran, 9 Ky. 271 (1820); Ill.Rev.Stat. ch. 38, ¶ 7-2. He certainly was entitled to call on the police to obviate the need for self-help by preventing what was undoubtedly a criminal trespass to his property, since the trespassers were not acting under even a colorable entitlement.

Which shows by the way that this is not a case of inaction. Without the presence of the police, Mrs. Hale might have feared to order the forcible removal of the trailer from its moorings. The police prevented Soldal from exercising his statutory right to defend his property. That is state action. *Howerton v. Gabica*, 708 F.2d 380 (9th Cir.1983); *Booker v. City of Atlanta*, 776 F.2d 272, 273 (11th Cir.1985) (per curiam). It was therefore not necessary for the Soldals' lawyer to drag in conspiracy doctrine for the purpose of imputing the action of the private defendants to the public ones, or for any other purpose that we can see. But the plaintiffs have chosen to cast their claim as one of conspiracy, thereby raising the difficult question whether the sheriff's police were acting in agreement with Mrs. Hale or other agents of Terrace Properties in preventing Soldal from defending his property; so we shall soldier on. There is some evidence of agreement, beyond the scraps already mentioned. The terms in which the deputy sheriffs spoke to Soldal ("we're here to prevent you from interfering with Terrace's workers" and "you heard what she said") could be thought to imply that they considered themselves Hale's agents. then there are those long confabs between the sheriff's lieutenant and Hale and other employees of Terrace. What were they all talking about? May they not have been discussing the best, albeit an illegal, way to get rid of a village pest?

An agreement is bilateral, however; so we must ask, what could there have been in it for the sheriff's office? Well, the sheriff's office may have regarded Soldal as a troublemaker and therefore have been happy to cooperate with Terrace Properties in getting rid of him. All this is terribly speculative, though – and in the end quite irrelevant. Suppose the Soldals *have* made out a prima facie case that Terrace and Hale conspired with public officers to circumvent the procedural protections to which Illinois law entitles tenants such as the Soldals, and in the course of the conspiracy damaged the trailer. Or suppose, forgetting conspiracy, that the plaintiffs have made out a prima facie case that the sheriff's police deprived them of the trailer, which was their property, and in the course of that deprivation damaged the trailer. Either way, the plaintiffs could not, at least as they have framed the case, obtain damages for the deprivation.

The denial of procedural rights as a result of the random and unauthorized acts of subordinate public officers – a good description of the acts of the deputy sheriffs in this case – is not actionable in a suit under section 1983 unless the plaintiff lacks adequate remedies under state law. *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The damage to the trailer was purely pecuniary, and can be recovered in a suit against Terrace Properties for trespass in violation of Illinois law. (We are perplexed that the Sodals did not append a state law trespass claim as a pendant to their constitutional claims.) The Soldals do not argue that such a remedy would be inadequate; make nothing of the fact that it would not be a remedy against the public defendants (and the briefs are silent about the existence or adequacy of a state law

remedy against those defendants); do not argue that a pre-deprivation hearing would have been feasible; do not argue that, if such a hearing would have been feasible, a state law remedy that did not provide for one would be inadequate; make nothing of the fact that the deputy sheriff checked with his superiors during the eviction (but see *Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir.1990) (en banc)). Finally, in their reply brief they forgo any claim to a denial of their procedural rights. We conclude that there is no issue of procedural due process before us.

This does not end the matter, because in some cases, as the Soldals emphasize, a deprivation of property can be attacked as a violation of substantive due process, and then the existence of adequate state judicial remedies is no bar to the maintenance of the constitutional tort suit. *Zinermon v. Burch, supra*, 110 S.Ct. at 983. As a matter of federal constitutional law, if the government takes private property for a public use it need only pay the owner the fair market value of the property. But if it takes private property for a private use – say it takes the Soldals' trailer and gives it to Mrs. hale because she is a personal friend of powerful public officials – then the taking is not privileged by the takings clause of the Fifth Amendment, viewed as a grant of power to the government to take a person's property upon payment of its fair market value ("just compensation"). It is then a naked deprivation of property, and the owner is entitled to get it back or, if that is infeasible, to obtain full common law damages. An action so conceived is a plausible, though not clearly proper, invocation of substantive due process, for reasons explained in *Coniston Corp. v. Village of Hoffman Estates*,

844 F.2d 461, 464-66 (7th Cir.1988). But it is of no help to the Soldals. The defendants were not trying to take the trailer and give it to someone else; they were trying to make an eviction without providing the procedural safeguards to which Illinois law entitles a tenant; they were denying the Soldals' procedural, not their substantive, rights. Cf. *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir.1986).

It makes no difference if the focus is switched from the removal of the trailer from the trailer park to the physical damage done to the trailer in the process of eviction. Since there may be, we have conceded, cases in which the taking by public officers of private property for a private rather than for a public use can be construed as a denial of substantive due process, there may also be cases in which wanton, gratuitous damage to private property by public officers can be construed as a denial of substantive due process. But that is not the nature of the Soldals' allegation. Their allegation is that the eviction was unlawful – which it was – and *therefore* they are entitled to recover the costs that the eviction imposed on them, costs that include both the damage to the trailer and the deprivation of the use of the trailer. If the limitations on challenging procedural violations on constitutional grounds can be got round by charging every *consequence* of the violation as a denial of substantive due process, those limitations are down the drain; every procedural due process claim is convertible into a substantive due process claim by the facile expedient of slicing the claim into its constituent parts. If the eviction had been proper, the incidental costs to the Soldals could not be made the basis of a constitutional claim; if it was

improper – and it *was* improper – it was improper because the *procedures* prescribed by state law were not complied with.

This would be the end of the Soldals' case so far as the alleged conspiracy to evict them is concerned had the defendants not carried off the Soldals' trailer. But they did, and the Soldals argue that by doing so they seized the trailer in violation of the Fourth Amendment. If they are right, then the case again is out of the realm of purely procedural due process (i.e., right to notice and hearing); and, to repeat, a constitutional right that is not simply the elementary due process right to notice and a hearing is actionable under section 1983 regardless of the adequacy of the plaintiff's remedies under state law.

The question whether a repossession conducted or assisted by state officers is actionable under the Fourth Amendment was left open in *Fuentes v. Shevin*, 407 U.S. 67, 96 n. 32, 92 S.Ct. 1983, 2002 n. 32, 32 L.Ed.2d 556 (1972), and no other case addresses it. We are pretty confident that the Supreme Court would answer "no" if the issue ever came before the Court. Literally, it is true, what the defendants did here was to "seize" the plaintiffs' trailer. *United States v. Jacobson*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). And since the Fourth Amendment guarantees the right of the people to be secure in their houses, papers, and effects, as well as in their persons, against unreasonable searches and seizures, physical damage to a home inflicted in the course of a search, or of an arrest or other seizure, is actionable under that amendment. But the damage is not itself the search or seizure. And the second clause of the Fourth Amendment, the warrant clause, indicates, what has long

been assumed with ample support in the background and legislative history of the amendment, on which see Taylor, Two Studies in Constitutional Interpretation, pt. 1 (1969); Lesson, The History and Development of the Fourth Amendment to the United States Constitution, chs. 2, 3 (1937), that the searches and seizures to which the amendment refers are those made for purposes of law enforcement, not those incident to ordinary property disputes. It is true that statutes and, even more clearly, constitutional provisions are not cabined to the particular abuses that gave rise to the enactment. A pertinent example is that the Fourth Amendment has been extended to administrative searches of a sort not envisaged when the amendment was drafted. But it is equally true that taking a word out of context, whether a semantic or an historical context, is a frequent source of interpretive error. As a practical matter, we cannot see what is to be gained by converting every repossession by state officers and every condemnation of a house into a Fourth Amendment case. It would mean that the Supreme Court's efforts to set limits on constitutional claims of procedural irregularities would be thwarted, because every deprivation of property without due process of law would be redescribed as a seizure of property in violation of the Fourth Amendment. We conclude that until Soldal was arrested, there was no search or seizure in the Fourth Amendment sense of those words.

However devastating to the Soldals' efforts to obtain damages under federal constitutional law for damage to the trailer, this analysis does not affect Soldal's claims of false arrest. The first arrest occurred when Soldal returned the morning after the eviction to pick up his

children. Had he been arrested on the street, by an officer unaware that Soldal had left his children with a friend in the trailer park, the arrest would have been based on probable cause to believe that Soldal was trespassing; for Hale had made clear to him in no uncertain terms that he was not welcome. But he was arrested at a friend's trailer home. The defendants do not argue that the arresting officer or anyone else believed that Soldal had broken into or otherwise forced his way into the trailer over the occupant's objection. He was there at the invitation of the occupant – and everyone knew this. Illinois' criminal trespass statute contains an express exception for a lessee's invitee, Ill.Rev.Stat. ch. 38, ¶ 21-3, so there is no basis for an argument that Soldal's presence in the trailer showed that he had committed a criminal trespass against Terrace Properties in order to get there. A reasonable officer would have inferred from the presence of Soldal as a guest in a tenant's home that he was not trespassing, and before making an arrest would at least have attempted to determine what Soldal was doing there, which he could easily have done by asking the tenant. When he discovered that Soldal was there at the tenant's invitation to pick up his children, he would have dropped any idea of arresting him. At least on the record before us, the arrest was not based on probable cause.

The second arrest was just as unreasonable. The test for criminal assault is whether the defendant's conduct placed the victim in *reasonable* apprehension of an imminent battery. Ill.Rev.Stat. ch. 38 ¶ 12-1(a). "Conduct" in this setting has traditionally been thought to imply a gesture, rather than just words. "Mere words" do not an assault make. *People v. Dudgeon*, 341 Ill.App. 533, 540, 94

N.E.2d 556, 560 (1950). We need not decide how much of this old saw survives in Illinois after *People v. Ferguson*, 181 Ill.App.3d 950, 130 Ill.Dec. 551, 537 N.E.2d 880 (1989), where a purely verbal threat to kick the complaining witness was held to constitute a criminal assault because the defendant was within kicking distance when he uttered the threat in what appeared to be a serious manner that made the witness think the defendant was in fact about to kick him. But all this is to one side of the present case. It has been the law for centuries that an apprehension of an imminent battery, however created, is not reasonable if the defendant's words, however otherwise threatening, expressly negative a condition required for the battery to occur. "If it were not assize-time, I would not take such language from you." *Tuberville v. Savage*, 1 Mod.Rep. 3, 86 Eng.Rep. 684 (1699). It *was* assize time, and the victim knew it. So there was no assault. No more was there one here, so far as appears from the record. Soldal invited Peterson to step outside. That is, he invited him to fight. An invitation is not a command, and a reasonable man would know this. It is as if Soldal had said, "If you were to accept my invitation to fight, I would knock your block off." Of course there may have been something in Soldal's tone, or in accompanying gestures, that intimated that Soldal would not accept a refusal of his invitation. But there is no evidence of such additional circumstances.

The plaintiffs' false arrest claims should not have been dismissed, though what is gained by casting them in conspiracy terms eludes us, and the district judge may wish on remand to consider whether any of these conspiracy claims can be sustained. Certainly the mere fact

that Peterson filed criminal charges would not make him a conspirator with the sheriff's police. And we agree with the district judge that no basis has been presented for imposing liability on Cook County, even assuming that the sheriff, whose office is separate from the rest of the Cook County government, can be thought to make policy for the County. *Thompson v. Duke*, 882 F.2d 1180 (7th Cir.1989). So far as appears, the harassment of the Soldals was an isolated abuse of power of which the sheriff and other high officials were completely ignorant, so that the harassment cannot be imputed to the county government. The doctrine of respondeat superior has been rejected for cases under section 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). The plaintiffs must show direct involvement of the policy-making level of the sheriff's office in the illegal activity of its employees. *Id.* at 694, 98 S.Ct. at 2037; *Pembauer v. City of Cincinnati*, 475 U.S. 469,. 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). They have not done this. And for reasons stated earlier they also have failed to establish an entitlement to relief for the damage to the trailer. So the conspiracy to evict is out. But neither the main nor pendent counts relating to the arrests should have been dismissed, although the attempt to rope in the private complainants as conspirators seems dubious, to say the least. The judgment is therefore

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FLAUM, Circuit Judge, concurring in part and dissenting in part.

I join the majority's opinion that Soldal's false arrest claims must be remanded for trial. I also believe that his

due process claim should be remanded, however, and therefore respectfully dissent as to the disposition of that claim.

I differ with the majority largely because I cannot agree that "denial of procedural rights" is a "good description of the acts of the deputy sheriffs in this case." *See supra* at 1248. The majority discusses substantive due process, and acknowledges that the damage done to the Soldals' trailer was a deprivation of property, one that raises at least a "plausible" substantive due process claim, but maintains that the Soldals' suit was not "an action so conceived." *See supra* at 1248. Even the defendants concede, however, that Soldal alleged a violation of substantive due process, *see* Brief at 2, and elsewhere in its opinion the court seems to acknowledge the same as well – *see supra* at 1245 (defendants "are accused of conspiring . . . to damage the Soldals' trailer"). In my view, the Soldals' complaint should settle the matter, for it alleges that the defendants conspired to deprive them of their *substantive* due process rights by, among other things, *damaging* the trailer. *See* complaint ¶ 31 ("Defendants . . . conspired together to violate the constitutional rights of Plaintiffs by unlawfully evicting Plaintiffs, removing them from the trailer park, *and destroying their property*. . . . ") (emphasis added); *see also* ¶ 33 (explicitly alleging violation of "substantive due process"). Respectfully, these allegations do not support the majority's view that the nature of the Soldals' due process claim is procedural only.

The majority maintains that the damage to the Soldals' trailer was merely the consequence of the procedural violation, rather than an independent

deprivation, but that is a [sic] neither a meaningful nor instructive distinction. An eviction order does not constitute a license to pillage the property subject to the order, and it is hard to imagine how wanton destruction inflicted during the course of an otherwise lawful eviction would be an "incidental" effect of carrying out the eviction. In my judgment, no amount of procedure could have legitimized an effort to intentionally damage the Soldals' trailer, which – reading the facts in the light most favorable to the Soldals – is what happened. As Judge Posner's factual narrative suggests, there is sufficient evidence to support an inference that the trailer park employees, aided by the actions of the sheriff's deputy, deliberately damaged the trailer. Since, as the majority recognizes, "severe damage is a partial . . . but actionable deprivation," I would remand the fourteenth amendment claim for trial.

I should also note that I do not share the majority's confidence that an unreasonable repossession conducted by state officers is not actionable under the fourth amendment. The majority fears that recognizing the Soldals' fourth amendment claim would thwart the Supreme Court's "efforts to set limits on constitutional claims of procedural irregularities . . . because every deprivation of property without due process of law would be redescribed as a seizure of property in violation of the Fourth Amendment." *Supra* at 1250. The Court, however, seems less concerned with limiting procedural due process claims, and the fourth amendment, than does the majority. As Judge Posner acknowledges, the Court left this question open in *Fuentes;* even more instructive, in *Fuentes* the Court explicitly premised its reserve on the

condition that a preseizure hearing take place. *See* 407 U.S. at 96, n. 32, 92 S.Ct. at 2002 n. 32 ("once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated.") The Court again declined to address whether the plaintiff had a fourth amendment claim in *Zinermon*, but did point to the fourth amendment specifically as a ground that would support a § 1983 action even if state remedies to redress a deprivation were available. *See* 100 S.Ct. at 983 & n. 12. In light of the Court's language of reservation, I am reluctant to attribute to it a position that would limit fundamental constitutional rights like those encompassed in the fourth amendment.

"The strictures of the Fourth Amendment . . . have been applied to the conduct of governmental officials in various civil activities." *O'Connor v. Ortega*, 480 U.S. 709, 714, 107 S.Ct. 1492, 1496, 94 L.Ed.2d 714 (1987) (plurality opinion). Granted, the judicial process required to make the state's seizure of property in the course of a civil proceeding comport with the fourth amendment differs from that required in a criminal investigation. *See, e.g., Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S (18 How.) 272, 285, 15 L.Ed. 372 (1856); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1150 (D.C.Cir.) (Wright, J.), *cert. denied*, 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969). But that is not to say that the amendment does not impose some minimum requirements to protect citizens from unlawful intrusions in the course of civil proceedings, whether the government institutes the action directly or whether it is acting at the behest of private parties. It does. *See, e.g., Specht v. Jensen*,

832 F.2d 1516 (10th Cir.1987); *United States v. Device More or Less Labeled Thermatic*, 641 F.2d 1289 (9th Cir.1981); *United States v. Articles of Hazardous Substance*, 588 F.2d 39, 43 (4th Cir.1978); *Founding Church of Scientology, supra; Dawes v. Philadelphia Gas Commission*, 421 F.Supp. 806, 824 (E.D.Pa.1976); *Miloszewski v. Sears Roebuck & Co.*, 346 F.Supp. 119 (W.D.Mich.1972); *Laprease v. Raymours Furniture Co.*, 315 F.Supp. 716 (N.D.N.Y.1970) (three-judge court); *cf. Wyman v. James*, 400 U.S. 309, 318, 91 S.Ct. 381, 386, 27 L.Ed.2d 408 (1971) (home visits by caseworker did not violate fourth amendment because they were not unreasonable); *Benigni v. City of Hemet*, 879 F.2d 473, 477 (9th Cir.1988) (fourth amendment applies to harassing "inspections" by police of a local bar); *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir.1981) (upholding § 1983 action when police assisted an unlawful eviction but not specifying the source of the constitutional violation).

The majority would confine operation of the fourth amendment to "law enforcement activities," a term that presumably encompasses civil proceedings instituted by the government, but not those instituted by private parties. Whether the government conducts a search or seizure for private of public ends, however, is but a factor bearing on the reasonableness of its action; it does not obviate the need to make the fourth amendment inquiry. *Cf. Ortega*, 480 U.S. at 730-31, 107 S.'Ct. at 1504 (Scalia, J., concurring) (whether search is conducted by police or government employer does not affect availability of fourth amendment protection; identity of government actor is relevant only to purpose and reasonableness). In either case, the government participation is just as real.

By the majority's logic, an individual the police suspect of illegality, but against whom they have an insufficient quantum of cause to arrest, or to search or seize property, is entitled to greater constitutional protection against unlawful seizures than one against whom the police harbor no suspicions at all. A suspected malfeasor would have a § 1983 action, but a completely innocent victim of a governmental invasion would not.

The Supreme Court rejected a similar approach when it held the fourth amendment applicable to administrative searches in *Camera v. Municipal Court*, 387 U.S. 523, 530-31, 87 S.Ct. 1727, 1731-32, 18 L.Ed.2d 930 (1967). The Court observed that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior" for "even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority. . . . "; *see also Wyman*, 400 U.S. at 317, 91 S.Ct. at 386 ("one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior"); *Go-Bart Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374 (1931) (The fourth amendment "is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent. . . . "). The anomaly is particularly graphic in the majority's opinion, which affirms Soldal's § 1983 action for false arrest while denying his right to sue for the wrongful seizure of (and damage to) his trailer the day before, and where both actions stem from the same *property* dispute.

Reasonableness, which is the linchpin of the fourth amendment inquiry in all other contexts, should govern in this one as well. "A determination of the standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Ortega*, 480 U.S. at 719, 107 S.Ct. at 1498 (quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Camara*, 387 U.S. at 536-37, 87 S.Ct. at 1735). When, as here, there is no significant legitimate governmental interest at stake, the alleged government action is patently unreasonable. I agree that there is little "to be gained by turning *every* repossession by state officers into a Fourth Amendment case," but neither do we gain by completely restricting the scope of constitutional protection to cases in which the government suspects one of illegal activity. Certainly, the fourth amendment should not bar every repossession or other type of governmental seizure, but it should be applied to those that, like the one alleged here, are clearly arbitrary and unreasonable.

United States Court of Appeals,
Seventh Circuit.

Edward SOLDAL, et al., Plaintiffs-Appellants,

v.

COUNTY OF COOK, et al., Defendants-Appellees.

No. 89-3631.

Argued Sept. 14, 1990.

Decided Jan. 24, 1991.

Reheard En Banc June 11, 1991.

Decided Aug. 27, 1991.

Before BAUER, Chief Judge, and CUMMINGS, WOOD, Jr., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION and KANNE, Circuit Judges.

POSNER, Circuit Judge.

We granted rehearing en banc to consider the applicability of the Fourth Amendment, which forbids unreasonable searches and seizures, to the removal of a mobile home from a trailer park. The three-judge panel that first heard the appeal held by a divided vote that the removal was not within the scope of the Fourth Amendment 923 F.2d 1241, 1249-50 (7th Cir.1991). The full court adheres to this conclusion but has decided to elaborate its grounds. This opinion supersedes the panel's discussion of the Fourth Amendment, but in all other respects the panel opinion is reinstated.

Edward Soldal lived with his wife and four children in a trailer home, which he owned, situated on a rented lot in a trailer park in Elk Grove, Illinois. The owner of

the trailer park, Terrace Properties, decided to evict the Soldals, and sued in an Illinois state court for an eviction order. Two weeks *before* the court hearing, Terrace Properties decided to go ahead and evict the Soldals forcibly. Anticipating the possibility of resistance, Margaret Hale, the manager of the trailer park, notified the Cook County sheriff's office' and when two employees of Terrace Properties showed up at the Soldals' trailer home to remove it, they were accompanied by a Cook County deputy sheriff, who told Soldal that he was there to prevent him from interfering with the eviction. Other deputy sheriffs were also at the scene to ensure that the eviction proceeded without interruption. In removing the sewer and water boxes from the side of the trailer home, the employees damaged the home. When they finished disconnecting the home from the utilities, they towed it off the lot and out of the trailer park. The eviction violated Illinois law, because no court order authorizing it had yet been issued – none ever *was* issued.

The Soldals' suit is against Terrace Properties and Mrs. Hale as well as against the deputy sheriffs, and is brought under 42 U.S.C. § 1983, which provides a civil remedy for the deprivation of federal rights by persons acting under color of state law. An initial problem in such a case, from a plaintiff's standpoint, is how to bring *private* defendants under the rubric of persons acting under color of *state* law, a category normally reserved for state and municipal employees. Had the private defendants in this case, Terrace Properties and Mrs. Hale, been acting pursuant to a court order when they had the trailer home removed, this might have made their action state action. *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*,

795 F.2d 1344, 1346 (7th Cir.1986); cf. *Edmonson v. Leesville Concrete Co.*, ___ U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). But they were not; and the action of a private person in enforcing rights conferred on him by state law is not deemed state action. *Id.* 111 S.Ct. at 2083; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164-65, 98 S.Ct. 1729, 1737-38, 56 L.Ed.2d 185 (1978). Otherwise everything would be state action, since what law does not forbid it permits.

As for the public defendants in this case – the deputy sheriffs (county police) – the mere presence of police at the scene of a private act (here, the eviction of the Soldals by Terrace's employees) *in which they do not participate* does not transform the private act into a public one. *Gramenos v. Jewel Cos.*, 797 F.2d 432, 435 (7th Cir.1986). But there was more here. The eviction was unlawful, and Soldal had a common law right to resist it forcibly, although his right was limited to using mild force. The deputy sheriffs prevented Soldal from exercising his right, and while this by itself may not have made them actual participants in the eviction, the condition of the record (the case was dismissed on summary judgment) requires us, as the panel opinion explained, to assume that there was a conspiracy between the private and the public defendants – that the deputy sheriffs joined Terrace Properties in a scheme to get rid of a pesky tenant, a troublemaker. 923 F.2d at 1247-48. If so, it is as if the deputy sheriffs themselves seized the trailer, disconnected it from the utilities, and towed it away. Equivalently it is as if they had deputized the private defendants

to assist them. Thus, on the state of the record, we must regard *all* of the defendants as having acted under color of state law.

This frames the question that we granted rehearing en banc to decide: If police officers disconnect and tow away a trailer home, can their action be challenged under the Fourth Amendment as an unreasonable seizure? The question is of surprising novelty, and its implications for other forms of eviction and even perhaps for the repossession of automobiles and other personal property make it of potentially far-reaching practical significance. The history of the question in the courts can be recounted briefly. The question was left open in *Fuentes v. Shevin*, 407 U.S. 67, 96 n. 32, 92 S.Ct. 1983, 2002 n. 32, 32 L.Ed.2d 556 (1972). A glancing reference in *Tavarez v. O'Malley*, 826 F.2d 671, 678 (7th Cir.1987), expressed the skeptician of three members of this court. The Third Circuit gave a peremptory "no" in *Lebowitz v. Forbes Leasing & Finance Corp.*, 456 F.2d 979, 980 (3d Cir.1972). There is, as we shall see, a Tenth Circuit case that bears closely though not decisively on the issue. The district courts are divided on it. Compare *Dorsey v. Community Stores Corp.*, 346 F.Supp. 103 (E.D.Wis.1972) (3-judge panel), and *Laprease v. Raymours Furniture Co.*, 315 F.Supp. 716, 721-22 (N.D.N.Y.1970) (same), with *McCormick v. First National Bank*, 322 F.Supp. 604 (S.D.Fla.1971).

It is no accident that the question has not arisen more often. The straightforward way for a plaintiff to mount a challenge under section 1983 to an eviction or repossession or other deprivation of property is by claiming that he was deprived of his property without due process of law, as in the *Del's* case cited earlier and a host of other

cases. The panel held that the Soldals had abandoned any such claim. 923 F.2d at 1248. They were prudent to do so. In the circumstances of this case they would have faced a distinctly uphill fight to establish it. The Supreme Court has held that the denial of procedural rights (here the rights that Illinois law grants tenants in eviction proceedings) as a result of the random and unauthorized acts of subordinate public officers (the deputy sheriffs in this case) is not actionable under section 1983 unless the plaintiff lacks adequate judicial remedies under state law. *Parrattt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Zinerman v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); see also *Easter House v. Felder,* 910 F.2d 1387, 1396-97 (7th Cir.1990) (en banc). Illinois law entitled the Soldals to sue Terrace Properties and Mrs. Hale for the damages caused by the illegal eviction. Ill.Rev.Stat. ch. 80, ¶ 221. The Soldals had an adequate remedy. They failed to use it.

The existence of adequate legal remedies for an illegal eviction such as occurred here – state remedies if they are adequate, a federal remedy under the due process clause if not – is pertinent to deciding whether the Fourth Amendment should be bent to provide the Soldals with still another remedy. Bent it would have to be, because the amendment was never intended to regulate garden-variety commercial disputes of the sort involved in this case. Why bend, when the Soldals had adequate alternatives?

The Fourth Amendment regulates both "searches" and "seizures" and it will be helpful to distinguish between the two. Even though we are treating the employees of Terrace who did the actual disconnection

and removal as if they had been police officers employed by the State of Illinois, we can hardly construe their conduct as a police *search.* The "officers" did not enter the Soldals' trailer home. They had no interest in what was in it. They were not conducting an investigation or seeking to make an arrest. There was, however, at least in a literal sense, a "seizure" of the home and its contents; and while most seizures that are challenged under the Fourth Amendment are incidental to a search, some are not. The most common seizure challenged under the amendment is an arrest, and it is actionable whether or not it is accompanied by a search.

With only a few exceptions, the seizures held to be forbidden by the Fourth Amendment have been seizures made in the course of public law enforcement – certainly arrests are of that character – rather than repossessions or other seizures made in the course of a dispute between two private parties, even if police officers were assisting the person doing the seizing to the extent of being coconspirators with him. A good example is *Autoworld Specialty Cars, Inc. v. United States,* 815 F.2d 385, 389 (6th Cir.1987), where law enforcement officers removed vehicles from a dealer's showroom for use in evidence in a criminal prosecution against the dealer. It could indeed be argued on textual and historical grounds that despite its broad wording the Fourth Amendment has no proper application outside the law enforcement context. Not only the second clause of the Fourth Amendment – the clause that places limitations on warrants – but also the background against which the amendment was enacted indicates that the searches and seizures to which the amendment refers are those made for purposes of law enforcement, not

those made in connection with private disputes over property rights. Cf. *Wyman v. Jones*, 400 U.S. 309, 317, 91 S.Ct. 381, 385, 27 L.Ed.2d 408 (1971).

But a constitutional provision need not be interpreted so narrowly as to disable it from reaching novel abuses of power. The Fourth Amendment, at least, has not been so interpreted. It has been held to regulate wiretapping and administrative searches, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), neither a practice with which the framers of the amendment were acquainted. Repossessions and evictions may be far from the core of the Fourth Amendment but we hesitate to suggest that they can never provide the setting for a violation of the amendment. In *Specht v. Jensen*, 832 F.2d 1516 (10th Cir.1987), remanded on unrelated grounds, 853 F.2d 805 (10th Cir. 1988) (en banc), a search of the plaintiff's home by a creditor accompanied by the police was held to violate the Fourth Amendment. We agree with that decision; and it is the closest case to ours. But there is a crucial difference. In *Specht* the conduct of the police invaded an interest that the Fourth Amendment unquestionably protects: the interest in the privacy of the home. (The court in *Specht* emphasized this point. 832 F.2d at 1520.) The invasion was no less extensive, intrusive, or injurious just because the police were assisting a creditor rather than enforcing criminal or other public law.

It might seem, though, that the removal of the trailer home in this case was a "seizure" on the same footing with the "search" of the home in *Specht*. Literally there was a "seizure" here, but to use a literal interpretation of

a constitutional provision enacted two centuries ago to make every repossession and eviction with police assistance actionable under – of all things – the Fourth Amendment would both trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts. That trivializing, this shift, can be prevented by recognizing the difference between possessory and privacy interests.

The police did not enter Soldal's trailer home. They did not rummage among his possessions. They did not arrest him (that came later, and is dealt with in an unrelated part of the panel opinion). They did not invade the private "space," for solitude or secrecy, that the Fourth Amendment protects. *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). In that respect this case is like *Cardwell v. Lewis*, 417 U.S. 583, 591, 94 S.Ct. 2464, 2470, 41 L.Ed.2d 325 (1974) (plurality opinion), where "nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence. With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed." (Footnotes omitted.) The police did, of course, take Soldal's home away, and that was a grave deprivation. But it was a deprivation purely of property; there was no invasion of the Soldals' privacy.

Of course this conclusion depends on how broadly or narrowly we define "privacy." Any interference with solitude is an infringement of privacy in a perfectly good

sense of the word; thus an unwanted telephone solicitation is an invasion of privacy. And the Supreme Court has often used "privacy" as a synonym for reproductive autonomy. But it would be odd to suggest that a telephone solicitation aimed at selling tickets to the policemen's ball, or a law regulating abortions, invades privacy in a sense *relevant to the Fourth Amendment*. That sense has to do, rather, with the interest in keeping at bay prying ears and prying eyes. It is not invaded by an eviction or repossession; it can be invaded by a search or other entry into the home incident to an eviction or repossession.

In modern law the interests in property and in (Fourth Amendment) privacy are protected by different constitutional provisions and by different bodies of constitutional doctrine. *Hudson v. Palmer*, 468 U.S. 517, 538-40, 104 S.Ct. 3194, 3206-07, 82 L.Ed.2d 393 (1984) (concurring opinion). It is true that the older cases, illustrated by *Olmstead*, often tied the protections of the Fourth Amendment to property concepts, such as trespass. The modern cases, however, well illustrated by *Katz*, which overruled *Olmstead*, refocus the amendment from property to privacy in accordance with Justice Brandeis's dissent in *Olmstead*. This leaves deprivations of property to be regulated by the due process clause (also the takings clause, but that is not involved in this appeal, for reasons explained in the panel opinion, 923 F.2d at 1248-49). We have already noted that in interpreting that clause the Supreme Court had held (with qualifications not relevant to our case) that a person who claims to have been deprived of his property by the state without due process of law must use the judicial

remedies that the state has provided for such deprivations. That requirement would be nullified if the property owner could avoid it by recasting his suit as one under the Fourth Amendment rather than under the Fifth (or Fourteenth) Amendment. The elaborate jurisprudence of property deprivations under the due process clause that culminates in *Zinerman v. Burch* would turn out to be a point about pleading.

Hudson v. Palmer illustrates the distinction we are making between property and privacy. Prison guards searched the plaintiff's cell and seized items of his personal property. This was as much a seizure of property as the removal of the Soldals' trailer. Yet the Supreme Court held that the Fourth Amendment did not apply. It did not apply because, the majority opinion concludes (Justice O'Connor's concurrence is less definite on this point and she was the fifth vote, but she joined Chief Justice Burger's opinion, thus making it a majority opinion), prison inmates have no right of privacy. 468 U.S. at 526-28 and n. 8, 104 S.Ct. at 3200-01 and n. 8. Prison extinguishes that. It does not extinguish property rights, but the Fourth Amendment does not provide a remedy for a pure deprivation of property rights. The remedy in a proper Fourth Amendment case includes the value of any property rights impaired or destroyed – such impairment or destruction is an item of consequential damages in a suit for the violation of the constitutional right. *Taliferro v. Augle*, 757 F.2d 157, 161-62 (7th Cir.1985); *Specht v. Jensen, supra*, 832 F.2d at 1528; *B.C.R. Transport Co. v. Fontaine*, 7227 F.2d 7, 12 (1st Cir. 1984); *Marrero v. City of Hialeah*, 625 F.2d 499, 514 (5th Cir.1980). but if the only rights impaired or destroyed are property rights, the case is not

actionable under the Fourth Amendment in the first place.

The cases, it is true, distinguish between a "possessory" interest said to be protected against unreasonable "seizure" and a "privacy" interest protected against unreasonable "search." *United States v. Jacobsen*, 466 U.S. 109, 113 and n. 5, 104 S.Ct. 1652, 1656 and n. 5, 80 L.Ed.2d 85 (1984); *Segura v. United States*, 468 U.S. 796, 806, 104 S.Ct. 3380, 3386, 82 L.Ed.2d 599 (1984); *Maryland v. Macon*, 472 U.S. 463, 469, 105 S.Ct. 2778, 2782 86 L.Ed.2d 370 (1985); *Arizona v. Hicks*, 480 U.S. 321, 324, 107 S.Ct. 1149, 1152, 94 L.Ed.2d 347 (1987); *Horton v. California*, ___ U.S. ___, 110 S.Ct. 2301, 2306, 110 L.Ed.2d 112 (1990); see 1 Wayne R. LaFave, *Search and Seizures* § 2.1(a), at pp. 299-300 (2d ed. 1987). Justice Stevens, dissenting in *Hudson v. Palmer*, thought that such decisions required a different result in that case. 468 U.S. at 543-44, 104 S.Ct. at 3209. Obviously the majority disagreed. The path of reconciliation lies in recognizing that the privacy which the Fourth Amendment protects is the privacy not only of oneself and one's home, as we have thus far been assuming, but also, as the amendment states, of one's "effects." "Effects" are personal property, and are frequently affected with a privacy interest. Just as it is an impairment of privacy to seize one's person (that is, to arrest one), so it can be an impairment of privacy to seize one's personal property. Opening a letter is an obvious example, and it is no accident that the list of protections in the Fourth Amendment includes "papers" as well as persons, houses, and effects. The opening of a package, as in *Jacobsen*, is another example of how a seizure can invade

privacy. But not every interference with exclusive dominion and control over one's property is a seizure in the relevant sense because not every such interference compromises privacy. Merely removing luggage from an airport conveyor belt and squeezing it has been held not to be a seizure. *United States v. Lovell*, 849 F.2d 910, 915-16 (5th Cir.1988); *United States v. Garcia*, 849 F.2d 917, 919 (5th Cir.1988); *United States v. Brown*, 884 F.2d 1309, 1311 (9th Cir.1989). See also *Arizona v. Hicks, supra*, 480 U.S. at 324, 107 S.Ct. at 1152; *United States v. Karo*, 468 U.S. 705, 712-13, 104 S.Ct. 3296, 3302, 82 L.Ed.2d 530 (1984). It is different if the police "secure" a residence, that is, take it over, without searching it, while awaiting the arrival of a search warrant. That is a palpable interference with privacy – the police are in the home, looking about – even though it is not a search; it is rightly classified as a Fourth Amendment seizure. *United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir.1989). The physical movement of the Soldals' home – the privacy of its interior uncompromised and unobserved – was not a seizure.

The distinction may seem a fine one. The Fourth Amendment abounds in fine distinctions, perhaps more than are necessary. *California v. Acevedo*, ___ U.S. ___, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991). But the particular distinction that we have just elaborated (and that future cases will no doubt elaborate further) between a Fourth Amendment seizure and other types of interference with property is necessary not only if we are to make sense of *Hudson v. Palmer*, but also if the Fourth Amendment is not to swallow the due process clause. If police tow an illegally parked car, without entering or even looking into it, it is a deprivation of property within the meaning of the

due process clause, *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir.1982); *Saukestelis v. City of Chicago*, 932 F.2d 1171, 1172 (7th Cir.1991), but is it also a seizure under the Fourth Amendment?

The distinction we are drawing between property and privacy interests in one sense helps explain, and in another sense is thrown into question by, the "plain view" doctrine, that is, the doctrine that if police are lawfully on the premises they can seize contraband or evidence that is in their plain view even if they had gained admittance to the premises without a warrant and without probable cause to believe they would find anything; their presence might, for example, be lawful only because the owner had consented. *Horton v. California, supra; United States v. Cardona-Rivera*, 904 F.2d 1149, 1154-55 (7th Cir.1990); *United States v. Perry*, 815 F.2d 1100, 1105 (7th Cir.1987). There is no incremental invasion of privacy if something is seized that is in, as it were, lawful public view; the thing is no longer private; and the owner's property right is not a Fourth Amendment shield. This point is further illustrated by *GM Leasing Corp. v. United States*, 429 U.S. 338, 351-52, 97 S.Ct. 619, 628, 50 L.Ed.2d 530 (1977), which upheld the Internal Revenue Service's seizure without a warrant of the plaintiff's automobiles because it "took place on public streets, parking lots, or other open places, and did not involve any violation of privacy," but not the seizure of books and records since that "involved intrusion in the privacy of the [plaintiff's] offices." Of similar character are the "open field" cases, such as *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), and *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984).

And see *Autoworld Specialty Cars, Inc. v. United States, supra*, 815 F.2d at 388.

Yet in all these cases the seizure of items that were in the public view, while lawful, was treated as a *Fourth Amendment* seizure, so that it had to be pronounced reasonable (for example because it was consented to, or supported by probable cause, or it seized something that was in plain view) before it could be permitted. The reason, however, is that seizures made in the course of investigations by police or other law enforcement officers are almost always, as in the plain view cases, the culmination of searches. The police search in order to seize, and it is the search *and ensuing seizure* that the Fourth Amendment by its reference to "searches and seizures" seeks to regulate. Seizure means one thing when it is the outcome of a search; it may mean something else when it stands apart from a search or any other investigative activity. The Fourth Amendment may still nominally apply, but precisely because there is no invasion of privacy, the usual rules do not apply.

There is another reason for distinguishing public law enforcement from other contexts in which seizures may occur, and that is the historical connection between the Fourth Amendment and liberty. The objection to an arrest is not only that it is an invasion of privacy, but also that it is a restriction of liberty. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968). Some property seizures are of this character as well, such as prolonged detention of an individual's luggage at an airport, which by preventing him from continuing on his way curtails his liberty. *United States v. Place*, 462 U.S. 696, 708-09, 103 S.Ct. 2637, 2645, 77 L.Ed.2d 110 (1983). In

none of these cases is the court concerned with property rights as such, although in some of the cases property rights get mentioned in connection with the questionof [sic] standing to maintain a Fourth Amendment challenge, an issue since laid to rest by *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). Outside of the law enforcement area the Fourth Amendment retains its force as a protection against searches, because they invade privacy. That is why we decline to confine the amendment to the law enforcement setting. But concerns of liberty will rarely be present outside of that setting and they are not in this case – which because it is a case of seizure, not search, does not involve an invasion of privacy either.

Thus, *no* interest protected by the Fourth Amendment is involved, and this helps show that even if, despite what we have said, there is some element or tincture of a Fourth Amendment seizure, it cannot carry the day for the Soldals. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), establishes the principle that the dominant character of the conduct challenged in a section 1983 case determines the constitutional standard under which it is evaluated. The narrow holding of *Graham* is that when the gist of the challenged conduct is an arrest, the court should use the standards of the Fourth Amendment to adjudge its lawfulness even though the conduct could also be characterized as a deprivation of liberty. But the converse should also be true. If the gist of the challenged conduct is a repossession or eviction conventionally challenged under the due process clause as a deprivation, recharacterization as a Fourth Amendment seizure is barred. The suggestion that

Graham stands for the proposition that all property disputes should so far as possible be stuffed into the Fourth Amendment strikes us as bizarre.

Mr. Soldal is neither an arrestee (so far as pertinent to this part of the case) nor a prison inmate, but the principles of *Graham v. Connor* and *Hudson v. Palmer* sweep broader than their facts or narrow holdings, and the need to carve the joint between the Fourth amendment and the due process clause is as urgent in this case as in an arrest case or a prisoner case. The decisions require us to mesh the different provisions in or incorporated by the Fourteenth Amendment while preserving their separate domains – and thus to make the amendment coherent. *Hudson* tells us to do so by allocating the protection of privacy to the Fourth Amendment and the protection of property to the due process clauses of the Fifth And Fourteenth Amendments. *United States v. Janik*, 723 F.2d 537, 547-48 (7th Cir.1983); cf. *United States v. Karo, supra*, 468 U.S. at 713, 104 S.Ct. at 3302. Mr. Soldal lost his property, but not his privacy or his liberty. He has no Fourth Amendment case. He had other legal remedies but he waived them.

The paradox seemingly presented by our decision – that the law-abiding have fewer rights under the Fourth Amendment than the criminal – is superficial. Different constitutional provisions protect different interests. The Fourth Amendment protects privacy, and that interest is more likely to be infringed by criminal investigations than by other governmental activities – though the law-abiding are, occasionally, the inadvertent and, rarely, the intended targets of a criminal investigation, and when that happens they receive the full protection of the

amendment. The due process clause of the Fifth and Fourteenth Amendments is among the provisions that protect property (though that is not all it protects); and property interests are more likely to be asserted by the law-abiding than by the criminal class. The Soldals, to repeat, had remedies; they chose the wrong one.

For the reasons stated in this and the panel opinion, the judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

EASTERBROOK, Circuit Judge, concurring.

One might think from reading the dissenting opinion that we have rejected *Entick v. Carrington*, [1765] 19 Howell's State Trials 1029. Yet everyone agrees that both privacy and possessory interests in a home are substantial and that the Soldals are entitled to damages if their allegations prove true. All the court's opinion, which I join, holds is that this dispute about premature eviction should be handled like other landlord-tenant disputes – in local housing court.

Dragooning such a case into federal court under the aegis of 42 U.S.C. § 1983 is lexically possible, for the fourth amendment is written broadly. When interpreting the Constitution it is tempting to see how far old texts can be pressed – for any limitations, any at all, create at least some possibility of horrible deeds slipping into the cracks. A sophisticated lawyer worried about abuses starts with the text and identifies its purposes and consequences. The fourth amendment protects both privacy and property – and of course property comprises many rights, including possession. Next comes a generalization in which the Constitution deals with whatever may

threaten these interests to any degree. That move eliminates loopholes, but at the expense of making the fourth amendment so universal that it occupies the field of governmental action. Privacy and property interests just about exhaust the entitlements our legal system recognizes. As the fourth amendment bars unreasonable action, a reading taking the covered interests to the limits transfers to the federal judiciary the power to decide whether every public action is reasonable. What is left for the rest of the Constitution – or for state law and democratic choice?

If the fourth amendment indeed covers all governmental action interfering with possessory interests, the implications are startling. Public employees repairing a street negligently rupture a gas main, requiring the evacuation of a city block. That action invades a possessory interest, for it deprives the householders of the practical ability to use their homes. Negligence is never reasonable, and the fourth amendment establishes objective standards, under which the public employees' states of mind do not matter. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989); *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 2782-83, 86 L.Ed.2d 370 (1985); *Scott v. United States*, 436 U.S. 128, 136-38, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978). Public utility companies will be surprised to learn that turning off the water or electricity poses not only a problem under the due process clause, which they may solve by offering their customers an opportunity to comment, *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), but also a problem under the fourth amendment, requiring *substantive* federal

review of the "reasonableness" of the decision – for disconnecting utilities is the step said to prevent the Soldals from using their trailer and so violate the fourth amendment.

All the sheriffs' deputies did was stand by while the landlord's employees disconnected the trailer's utilities and removed it from their lot. If this is a "seizure" of any kind by the deputies, cf. *California v. Hodari D.*, ___ U.S. ___, 111 S.Ct. 1547, 1550-51, 113 L.Ed.2d 690 (1991), it is problematic only because state law specifies that a court order precede eviction. Indeed, the only reason why the removal of the mobile home is said to be "unreasonable" is that it violated state law, and this whether or not the Soldals really were behind in their rent or disregarded some clause of the lease. Our case is another chapter in the saga of attempts to transmute state rules into constitutional ones. If the Soldals were right in thinking that there was a "seizure", the question would remain whether a federal norm, independent of state law, nonetheless deems their acts unreasonable. *Elkins v. United States*, 364 U.S. 206, 223-24, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry. . . . The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorabley suppressed."). States could decide to allow landlords to engage in self-help and put the burden of initiating litigation on the tenant. If deputies may keep the peace during self-help in a state where tenants must start the legal proceedings, they may

prevent violence during self-help in a state where landlords have (but disdain) the burden of initiation. Only state law distinguishes these cases, and the Constitution is unaffected by state law. It is hard to conceive of the Soldals' invocation of the litigation-first rule established by Illinois law as a claim under the fourth amendment, so the suit was properly dismissed even if a seizure occurred. States may decide for themselves how extensive will be the remedies for gun-jumping.

FLAUM, Circuit Judge, with whom BAUER, Chief Judge, and HARLINGTON WOOD, Jr., RIPPLE and KANNE, Circuit Judges, join, dissenting.[1]

In its effort to develop a rationale for denying the Soldals' fourth amendment claim, the majority has produced a remarkable holding. The fourth amendment, it maintains, governs should police *intrude* upon your privacy by searching your home. Should they instead intentionally *eliminate* your privacy by participating in the carting away of your residence, the fourth amendment can have no bearing. With all due respect, I dissent.

The majority acknowledges that the police denied the Soldals the privacy of their home, but maintains that the fourth amendment is concerned only with intrusions of privacy as the right to secrecy rather than as the right to solitude. To be sure, there is a distinction between these

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[1] My dissent is directed toward only the Soldal's [sic] fourth amendment claim regarding the seizure of their trailer. As I indicated in my dissent to the panel opinion, I concur in the remand of Mr. Soldal's fourth amendment claims arising from the subsequent unlawful arrests.

aspects of privacy, but not one that should bar the applicability of the fourth amendment in the limited and unique circumstances of this case.[2] Along with the right to secret one's effects, or words, or actions, the right of privacy encompassed by the fourth amendment protects – in Justice Brandeis' words, dissenting in *Olmstead* – "the right to be let alone," giving the individual the right to isolate himself from unreasonable government intrusions. In my view, there are few infringements of privacy greater than denying the enjoyment of one's home. Arrests – in which police figuratively, and often literally, remove the individual from the home, in contrast to taking the home from the individual – involve the most comparable deprivation of privacy. An arrest gives police the right to search the individual, but the applicability of the fourth amendment's protections to police conduct during arrests does not turn on whether or not they conduct a search incident to the arrest, so the invasion of privacy must be inherent in the arrest itself. The majority acknowledges the invasion of privacy inherent in arrests, *ante* at 1078, but does not address *how* an arrest invades privacy in any sense other than as an interference with the arrestee's right to solitude.

The analogy between an arrest and the police involvement in the seizure of the Soidals' trailer is easily seen when we consider what happened to Edward Soldal

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[2] To the extent that the fourth amendment affords different degrees of protection to these aspects of privacy, a stronger argument can be made for extending greater protection to the right of privacy as solitude rather than as secrecy. *See* R. Posner, Economic Analysis of Law 639 (3d ed. 1986).

the next day. When Mr. Soldal returned to the trailer park to retrieve two of his children (whom he had left with a neighbor for the night after he was evicted from the trailer park), police arrested him for trespassing. That seizure gave Mr. Soldal a fourth amendment claim, even though it was merely a continuation of the previous day's attempts to evict the Soldals from the trailer park. We all agree that Mr. Soldal has a valid fourth amendment claim because the arrest was made without probable cause to believe that he was a trespasser; why, then, does he not raise a valid fourth amendment claim with regard to the seizure of his home when police had no more basis for assisting in the eviction? Suppose that the police had been requested to usher Mr. Soldal and his family from the trailer park *before* their trailer was towed away. In that case, the Soldals would have a fourth amendment claim stemming from the forcible removal from the premises; why should they lose the claim when police first help to remove their home, giving them no choice but to leave?

I am not, of course, suggesting that the seizure of *any* private property is an infringement of privacy, for most property affords little privacy to persons as opposed to their effects. Indeed, the home appears *sui generis* in this important but limited regard. Taking a pen does not compromise the privacy of its owner's person, nor does seizing a container in which personal effects are stored. An automobile might, at one time, have been thought to afford privacy to its occupants (as well as to their possessions), but that era is past. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1979). By contrast, the right to privacy a home affords its residents, whether by

sheltering their possessions or their persons from government interference, has always been at the core of the fourth amendment's protections. "[T]he Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,' " for it is the home that, more than any other location, "provide[s] the setting for those intimate activities that the Amendment is intended to shelter from government *interference or surveillance.*" *Oliver v. United States,* 466 U.S. 170, 178-79, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (quoting *Payton v. New York,* 445 U.S. 573, 601, 100 S.Ct. 1371, 1387, 63 L.Ed.2d 639 (1980) (emphasis supplied)).

The majority's resort to *United States v. Lindsey,* 877 F.2d 777 (9th Cir.1989), puzzles me, as I conclude that the case clearly illustrates my point. The majority acknowledges that when, as in *Lindsey,* police secure a home without searching it, they violate the residents' fourth amendment rights. The Soldals allege that police violated their fourth amendment rights in almost exactly the fashion described in *Lindsay* – in both cases police action intruded upon the personal privacy of the occupants of the homes by eliminating their ability to isolate themselves within their residences – except that in this case instead of physically occupying the house, it is as if the police surrounded the exterior of the home and denied the residents access to it.[3] It seems to me that such an

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[3] In my view the distinction is largely irrelevant to fourth amendment analysis. Securing a home is a seizure that

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intrusion is every bit as "palpable" as the intrusion described in *Lindsey.*

In my judgment, the analogy to arrest leads to a broader, though no less telling, indictment of the majority's position. I respectfully suggest that the fourth amendment is not concerned exclusively with privacy. Indeed, the Court expressly rejected that view in *Katz v. United States,* the case the majority heralds as the confirmation that privacy alone is the fourth amendment's province. *See* 389 U.S. at 350, 88 S.Ct. at 510 ("[the Fourth Amendment] protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."). The analogy I draw between arrests and the seizure at issue in this case underscores the point. In the face of case law that states the proposition explicitly, the majority opinion recognizes that arrests implicate the fourth amendment not only because they invade privacy but also because they restrict liberty. *Ante* at 1080. Indeed, the opinion further observes that property seizures that infringe the property owner's liberty to go about his

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intrudes upon the solitude of the residents whether accomplished by an entry into the home or by surrounding its perimeter. Similarly, both methods "interfere to the same extent with the possessory interests of the owners." *Segura v. United States,* 468 U.S. 796, 811, 104 S.Ct. 3380, 3389, 82 L.Ed.2d 599 (1984) (Burger, C.J., joined by O'Connor, J.). More on this in a moment. In any event, whether it constitutes an invasion of privacy as solitude, an interference with possession, or both, securing a home is actionable under the fourth amendment, and that is the point recognized by the court in *Lindsey.*

business implicate the fourth amendment as well. *Id. United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), makes that point, and it is an instructive case for this and other reasons.

In *Place*, police detained the luggage of a suspected narcotics trafficker for three days before they obtained a search warrant. The police took custody of the bags initially while they made arrangements to have a narcotics dog sniff them; after the dog arrived and alerted to one of the bags some 90 minutes later, police retained the bags over the weekend until they could obtain a warrant from a magistrate on the following Monday morning. The Supreme Court held that although no search of the bags had occurred because the invasion of privacy entailed by the dog sniff was virtually nonexistent, 462 U.S. at 707, 103 S.Ct. at 2644, the bags had been unlawfully seized because the police had intruded "on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.* at 708, 103 S.Ct. at 2645.

I find the majority's not to *Place*, *ante* at 1079, to be misplaced in light of the reasoning employed and the result reached by the Court in that case. If the detention of luggage for even 90 minutes was an unreasonable deprivation of liberty in *Place*, *see* 462 U.S. at 709-10, 103 S.Ct. at 2645-46, I cannot concur with the majority's view that there was *no* deprivation of the Soldals' liberty interests, reasonable or otherwise, when their home was illegally towed away. Place, whom the police had some reason to suspect of criminal activity, was inconvenienced by the loss of the clothing, personal effects, and, of course, the cocaine, his bags contained. The Soldals,

whom police had no reason to suspect of any wrongdoing whatsoever, were deprived of the occupancy of their home. The members of the majority apparently believe that Place suffered a greater loss. I do not.

Perhaps even more distressing than the majority's conclusion that the police *did not* restrict the Soldals' liberty is its acknowledgement that the police *did* disrupt their possessory rights. The concession is disturbing, because the majority goes on to hold that the disruption is not actionable under the fourth amendment because it was not attended by any invasion of privacy. That position strikes me to be at odds with the myriad cases in which the Supreme Court has affirmed that the fourth amendment's proscription against unreasonable seizures shields the individual's *possessory* interest in the property seized – an interest altogether different than the individual's *privacy* interest in the property. The majority does not address the Court's statement in *Place* that the seizure violated the fourth amendment because it unreasonably infringed "the suspect's possessory interest in his luggage." 462 U.S. at 708, 103 S.Ct. at 2645. Nor does it heed cases like *Rakas v. Illinois*, in which the Court explicitly recognized that although a search of a home (and by extension, a car) does not violate any legitimate expectations of privacy of visitors in the home, those visitors could nonetheless "contest the lawfulness of the seizure of evidence . . . if their own property were seized during the search." 439 U.S. 128, 142 n. 11, 99 S.Ct. 421, 430 n. 11, 58 L.Ed.2d 387 (1978). *See also United States v. Salvucci*, 448 U.S. 83, 91 n. 6, 100 S.Ct. 2547, 2552 n. 6, 65 L.Ed.2d 619 (1980) ("Legal possession of the seized good may be sufficient in some circumstances to entitle a defendant to

seek the return of the seized property if the seizure, as opposed to the search, was illegal."); *United States v. Jackson*, 585 F.2d 653, 657 (4th Cir.1978) (defendant's ownership of a bag containing gambling receipts found in car belonging to another gave him standing to contest seizure of the bomb though not the search of the car) (citing *United States v. Lisk*, 522 F.2d 228, 230-31 (7th Cir.1975) (Stevens, J.), *cert. denied*, 423 U.S. 1078, 96 S.Ct. 865, 47 L.Ed.2d 89 (1976)). It devotes little attention to cases like *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), in which the Court held that by asserting control over a package that had already been opened and searched by private parties, federal agents "seized" the package for purposes of the fourth amendment even though the agents did not invade the privacy of the package's owner when they seized it. *Id.* at 120-21, 104 S.Ct. at 1660. *See also Autoworld Specialty Cars v. United States*, 815 F.2d 385, 389 (6th Cir.1987) (seizure by customs agents of automobiles displayed in public showroom subject to fourth amendment despite lack of invasion of privacy); *United States v. Bagley*, 772 F.2d 482, 490 (9th Cir.1985) (towing of lawfully parked car belonging to suspect who had not been apprehended "constituted a seizure within the meaning of the fourth amendment"); *United States v. Roberts*, 644 F.2d 683, 688 (8th Cir.1980) (en banc) (seizure by police of marijuana discovered by private party in rental storage unit actionable under fourth amendment). The majority does suggest that *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), supports its view, but does not explain that although no search or seizure took place when police obtained paint scrapings from the car, a seizure did occur when the

police towed the car away. *Id.* at 593, 94 S.Ct. at 2470. Another seizure occurred when police assisted in towing the Soldals' home away.

The Court's most recent affirmation, in 1990, of the fourth amendment's applicability when government officials interfere with possessory interests is, I submit, also its most plain. Consider the language of *Horton v. California*, ___ U.S. ___, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990):

> The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. The "plain view" doctrine is often considered an exception to the general rule that warrantless searches are unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *A seizure of the article, however, would obviously invade the owner's possessory interest.*

110 S.Ct. at 2306 (footnotes and citations omitted; emphasis added). For that reason, the seizure at issue in *Horton* was subject to fourth amendment analysis. I see no way to square the Supreme Court's view that seizures, even in the absence of an invasion of privacy, implicate the fourth amendment, with the majority's view that they do not.

Unlike the majority, I do not read *Hudson v. Palmer* to have fundamentally altered this longstanding tenet of the Supreme Court's fourth amendment jurisprudence. In

that case, prison authorities seized a ripped pillow case found in an inmate's cell during a "shakedown" search; the Court held that the prisoner did not have a cause of action under the fourth amendment. The majority says that *Palmer* shows the fourth amendment does not protect property interests because if it did the prisoner would have been able to invoke the fourth amendment to challenge the seizure of the pillowcase even if he were unable to challenge the search itself. *Palmer*'s result, however, was premised on the Court's conclusion that prison inmates have neither privacy *nor possessory* rights in property maintained in their jail cells. 468 U.S. at 527-28 & n. 8, 104 S.Ct. at 3200-01 & n. 8 (rejecting seizure claim "for the same reasons"); *id.* at 538, 104 S.Ct. at 3206 (O'Connor, J., concurring) ("The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects. . . . "); *id.* at 542, 544-45, 104 S.Ct. at 3208, 3209-10 (Stevens, J., dissenting) (rejecting majority's position that prisoner's have no privacy or possessory interests in their property); *see also* W. LaFave, Search and Seizure §§ 2.4(d), 10.9(a) (2d ed. 1987). the Court's holding, then, was limited to the prison environment, making the case particularly unsuited to carry the burden heaped upon it by the majority.

Troubled as I am by the majority's interpretation of binding precedent, consider why, under the majority's approach, *any* seizure, whether made in the course of a law enforcement investigation or a civil property dispute, should be subject to the strictures of the fourth amendment. When police seize a suspect's personal effects after a search, the seizure does not implicate the suspect's right to privacy. As *Horton* and *Place* explain, and the majority

apparently agrees, the invasion of privacy attends the search rather than the seizure. Why, then, does the majority treat a search as a prerequisite to a seizure under the fourth amendment? If the fourth amendment protects only privacy interests, if should not be employed to bar even those seizures that have been preceded by a search since the seizure itself does not infringe privacy. The majority ties these two distinct concepts together because it assumes that a seizure is the object of the invasion of privacy – "police search in order to seize." *Ante* at 1079. That assumption, I believe, misconceives the investigatory process. Police search to uncover information (therein lies the invasion of privacy); they seize for other reasons, usually to gather evidence to present at trial (therein lies the disruption of possession). This case illustrates another, albeit objectionable, reason police might seize private property. In neither case are seizures a necessary incident of a successful search -- police can present evidence of the results of a search or investigation by means of their own testimony. *Cf. United States v. Jacobsen*, 466 U.S. 109, 119, 104 S.Ct. 1652, 1659, 80 L.Ed.2d 85 (1984). The fourth amendment governs seizures, but not, as the majority asserts, because they are inextricably bound up with searches.[4] The reason is simply that the

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[4] To be sure, that a seizure has been preceded by a lawful invasion of privacy can be *relevant* to whether the seizure itself is reasonable. *See Jacobsen*, 466 U.S. at 120-22, 104 S.Ct. at 1660-61. But that is not to say that the applicability of the fourth amendment turns on an invasion of privacy but only that whether there has been a lawful invasion of privacy bears upon whether a subsequent seizure comports with the amendment's requirement of reasonableness. In the same way, the

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plain language of the fourth amendment guarantees the right to be secure against both "unreasonable searches *and* seizures."

The fourth amendment guarantees that right to the average citizen as well as to the average criminal. The outcome of this case highlights the anomaly, to which I adverted in my original dissent to the panel opinion, created by the majority's desire to restrict the scope of fourth amendment protections to cases in which the police, or other state actors, are engaged in investigative activity. That approach would extend greater fourth amendment protection to those suspected of crimes than to those against whom the police harbor no suspicions at all. *See* 923 F.2d at 1253. Unlike the majority, I do not find this to be a "superficial" concern. Neither, apparently, has the Supreme Court, which has found it necessary on repeated occasions to reiterate that the applicability of the fourth amendment does not turn on whether the victim of a search or seizure was the object of police suspicion. *See, e.g., O'Connor v. Ortega,* 480 U.S. 709, 714-15, 107 S.Ct. 1492, 1496, 94 L.Ed.2d 714 (1987) (searches and seizures by government employers of the private property of employees subject to fourth amendment) (plurality opinion); *Wyman v. Jones,* 400 U.S. 309, 317, 91 S.Ct. 381, 385-86, 27 L.Ed.2d 408 (1971) ("one's Fourth Amendment protection subsists apart from his being suspected of

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length of the deprivations suffered may be relevant to the reasonableness of the police actions, but not to the question of whether the fourth amendment applies at all. *Place,* 462 U.S. at 708-09, 103 S.Ct. at 2645.

criminal behavior"); *Camara v. Municipal Court,* 387 U.S. 523, 530-31, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 (1967) ("even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority"); *Go-Bart Co. v. United States,* 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374 (1931) ("[the fourth amendment] protects all, those suspected or known to be offenders as well as the innocent"); *Weeks v. United States,* 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914) ("This protection reaches all alike, whether accused of crime or not. . . . ").

To fully appreciate the incongruous nature of the majority's position, one must also consider how this case might have played out had the police acted more reasonably. Imagine that the sheriffs had been less willing to accommodate the Soldals' landlord when she told them that she wanted the Soldals out because they were behind in their rent. Suppose that instead of immediately assisting the landlord's employees, the police had forced Mr. Soldal to show them his lease, threatening to have his trailer towed away if he did not comply with their demand. Had the police done nothing further, they would certainly have disrupted the lives of the Soldals far less than they did when they helped to seize the trailer. And yet, under the majority's view, the Soldals might nevertheless have a fourth amendment cause of action – relating to the coerced "search" for the lease – when they would have no fourth amendment action if the police had dispensed with any investigation and had simply taken their cue from the landlord. Such a result, I suggest, has little to recommend it.

The majority nevertheless endorses this outcome. My colleagues apparently fear that recognizing the Soldals' fourth amendment claim will unleash in the federal courts a torrent of litigation stemming from private repossessions.[5] As I do not believe that government officials routinely ignore the law and evict people from their homes solely at the whim of private creditors, I do not share that concern. Even assuming for a moment that the incidence of such conduct is significant, it would not justify denying access to the federal courts to redress a meaningful constitutional injury. The majority's concern stems from its insistence on characterizing this case as a "garden variety" property dispute, but when police embroil themselves in such disputes, I submit that they lose their generic quality. This is not, as the majority alleges, an ordinary dispute between landlord and tenant, nor is it a case in which the police merely tried to "keep the peace." This is a troubling case in which the claim is that a landlord and the local police illegally teamed up to dislodge a man's home from its moorings and towed it away simply because they both found him disagreeable. I see *nothing* ordinary about this course of events, nor can I view it as a simple case of jumping the gun on otherwise constitutional state procedures.

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[5] Judge Easterbrook goes the majority one better, raising the specter that recognizing the Soldals' fourth amendment claim would open the flood gates to negligence claims clothed in the fourth amendment. Specter it is, though, because a seizure is the product of an intentional application of force, a point *California v. Hodari D.*, ___ U.S. ___, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), underscores.

The majority claims that the Soldals had other constitutional remedies available to them; their claim, says the court, is really a procedural due process claim that must be brought in state court if adequate remedies are available there. The Soldals' claim is no more a procedural due process claim, however, than is *any* fourth amendment claim; indeed, it is less so. A warrantless search may be "reasonable," in the sense that it is based on probable cause, and nevertheless violate the fourth amendment simply because those conducting the search failed to comply with the warrant procedures prescribed by law. *Katz*, 389 U.S. at 356-57, 88 S.Ct. at 514. Here, the police neither complied with the eviction procedures required by law nor (so far as we know) had any basis for believing that the eviction was warranted substantively.

As I pointed out in my original panel dissent, the Court in *Zinermon v. Burch* used a fourth amendment violation as the paradigmatic example of a case in which a plaintiff "may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common-law remedies. . . . " 494 U.S. 113, 110 S.Ct. 975, 982-83, 108 L.Ed.2d 100 (1990). The Court explained that procedural due process claims are those in which "the deprivation by state action . . . is not in itself unconstitutional." *Id.* As we have seen, unreasonable seizures are unconstitutional in and of themselves, and *Zinermon* should therefore set to rest any attempt to invoke the availability of state remedies as a ground for denying fourth amendment

claims.[6] This point was apparently not lost on the Soldals, who never attempted to characterize their claim as one for procedural due process, a fact acknowledged in the original panel opinion. *See* 923 F.2d at 1248.

Zinermon notwithstanding, the majority claims that *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), supports its approach. Once again, however, the majority and I part company over precedent. I would argue that *Graham* does not, as the majority claims, stand for the principle that the dominant *character* of the conduct challenged in a section 1983 case determines the only constitutional standard under which the case may be evaluated; that would mean that civil rights plaintiffs would be obliged to choose a single constitutional provision in which to ground their suits, even when the alleged infringement encompasses more than one constitutional provision (say, for example, the first and fourth amendments, as in cases where the authorities seize

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[6] Respectfully, Judge Easterbrook's reference to *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), puts the cart before the horse. The issue here is whether there has been a seizure within the meaning of the fourth amendment, not whether the seizure was reasonable. *Elkins* states that compliance with state procedures is not the benchmark of fourth amendment reasonableness. It, like *Zinermon*, rejects the view that the fourth amendment's scope depends on either the availability or adequacy of state procedures. As for the "reasonableness" of the seizure, I note only that the majority opinion acknowledges that the deputies did more than "keep the peace" and that we have held that in damages suits for alleged civil rights violations involving the fourth amendment, the reasonableness of police action is a question of fact for the jury. *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir.1985) (*en banc*).

allegedly obscene materials not for evidentiary purposes but simply to destroy them; these seizures must be reviewed under both the first *and* the fourth amendments – *see Heller v. New York*, 413 U.S. 483, 491, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745 (1973)). *Graham* is more accurately described, as it was in *Schroeder v. City of Chicago*, 927 F.2d 957, 961 (7th Cir. 1991) (Posner, J.), as establishing a preference for grounding section 1983 actions in specific provisions of the bill of rights where possible rather than relying on the more inchoate protections afforded by the doctrine of substantive due process. *See* 490 U.S. at 395, 109 S.Ct. at 1871 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). In this light, the majority's view that *Graham* requires the Soldals to rely on the due process clause in any fashion when they have a cause of action under the fourth amendment seems untenable.[7]

In an era in which "reasonable expectations of privacy" seem to be diminishing, preserving the sanctity of the home becomes all the more critical. We take too lightly "the right to be let alone" when we conclude that the fourth amendment has no possible relevance to a claim that deputy sheriffs, in contravention of the laws they are charged to know and uphold, helped roust a family from their home and cart it away at the behest of a

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[7] This is particularly true in light of the fact that the Soldals raised a *substantive* due process claim, but the original panel majority chose not to address it. *See* 923 F.2d at 1251.

trailer park manager. That is exactly the type of governmental intrusion that the fourth amendment regulates, whether we label the intrusion one of privacy, property, or liberty. The majority believes that we should recognize one more "fine distinction" in fourth amendment law – one that I find nowhere evident in the language of the amendment itself or the opinions of the Supreme Court – to stem an anticipated onslaught of fourth amendment *poseurs*. That belief provides little justification for hastening the demise of the most significant citadel of solitude available to Americans. The majority opinion does not merely nibble at the margins of the fourth amendment's protections; it gnaws at their very core. Some thirty years ago, dissenting from the Supreme Court's refusal to address the merits of a challenge to a Connecticut law prohibiting the use of contraceptives by married couples in *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), Justice Harlan anticipated and addressed precisely the argument the majority surfaces today, and I cannot improve upon his analysis:

> [I]t must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment . . . [was] intended to protect: here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind such a distinction is so insubstantial as to be captious: if the physical cartilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life.

Id. at 551, 81 S.Ct. at 1781. The majority's opinion compromises that preeminence, and I am therefore obliged to dissent.

SUPREME COURT OF THE UNITED STATES

No. 91-6516

Edward Soldal, et ux.,

Petitioners

v.

Cook County, Illinois

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 9, 1992

No. 91-6516

In The

Supreme Court of the United States

October Term, 1991

EDWARD SOLDAL, et al.,

Petitioners,

vs.

COOK COUNTY, ILLINOIS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Was the seizure and removal of petitioners' house and its contents governed by the Fourth Amendment's prohibition of unreasonable seizures where the seizure did not occur in the course of a criminal investigation?

2. Did the seizure, removal, and virtual destruction of petitioners' house and its contents violate the Fourteenth Amendment's guarantee of substantive due process?

LIST OF PARTIES

The parties to the proceeding in the court below were Edward Soldal, Mary Soldal, Jimmy Soldal, Alena Soldal, Joseph Soldal, and Jessie Soldal; Cook County deputy sheriffs Chief Wittsman, Captain Jackson, Captain Levy, Lieutenant Jones, Officer Haritos, Officer Hunt, Officer Vaid, Officer Doe and Officer Poe; Terrace Properties Inc., Jeffrey Peterson, Margaret Hale, Margaret Celeski and Kimberly Giovanni.

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 52-89) is reported at 942 F.2d 1073. The panel opinion of the court of appeals (J.A. 28-51) is reported at 923 F.2d 1241. The opinion of the United States District Court for the Northern District of Illinois (J.A. 3-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1991. The Petition for a Writ of Certiorari was filed on November 23, 1991 and was granted on March 9, 1992. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

a) The Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

b) Section 1 of the Fourteenth Amendment to the United States Constitution.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

c) 42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

d) Ill. Rev. Stat. Ch. 110 §9-101, 9-102(a)1-4, 9-103.

§9-101. Forcible entry prohibited. No person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he or she shall not enter with force, but in a peaceable manner.

§9-102. (a) When action may be maintained. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided:

1. When a forcible entry is made thereon.

2. When a peaceable entry is made and the possession unlawfully withheld.

3. When entry is made into vacant or unoccupied lands or tenements without right or title.

4. When any lessee of the lands or tenements, or any person holding under such lessee, holds possession without right after the termination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise . . .

§9-103. Mobile home site. The rental of land upon which a mobile home is placed or the rental of a mobile home and the land on which it is placed, for more than 30 days, shall be construed as a lease of real property.

e) Ill. Rev. Stat. Ch. 80 §201, 208.

§201. Applicability. This Act shall regulate and determine legal rights, remedies and obligations of the parties to any lease of a mobile home or mobile home lot in a mobile home park containing five or more mobile homes within this State. Any lease, written or oral, shall be unenforceable insofar as any provision thereof conflicts with any provision of this Act.

§208. Renewal of Lease. Every lease of a mobile home or lot in a mobile home park shall contain an option which automatically renews the lease; unless: (a) the tenant shall notify the owners 30 days prior to the expiration of the lease that he does not intend to renew the lease; or (b) the park owner shall notify the tenant 30 days prior to the expiration of the lease that the lease will not be renewed and specify in writing the reasons, such as violations of park rules, health and safety code or irregular or non-payment of rent.

STATEMENT OF THE CASE

This is an action brought pursuant to 42 U.S.C. §1983 by petitioners Edward and Mary Soldal and their children Jimmy, Alena, Joseph and Jessie. Count 1 of the complaint alleged that respondents Cook County deputy sheriffs and private parties violated petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution by unreasonably seizing and removing their trailer home from a mobile home park and damaging their property. R.1, par. 33.[1]

In March, 1985, petitioners Edward and Mary Soldal moved to Willoway Terrace mobile home park in Elk Grove Village, Illinois, where they rented a lot for their trailer home and lived with their children, petitioners Jimmy, Alena and, after their birth in 1986, Joseph and Jessie.[2] Respondent Terrace Properties Inc., often known as Willoway, was the owner of Willoway Terrace, and respondent Margaret Hale was the manager of the park. Under Illinois law, the Soldals, as tenants of a mobile home park, had the right to continue to rent their lot and

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[1] References denoted "R.___" are to the docket entries in the District Court. The complaint also brought claims under state law, and federal civil rights claims based on subsequent arrests of Edward Soldal. Certiorari was sought, and granted, only on whether the facts underlying Count 1 of the Complaint constituted a violation of petitioners' constitutional rights under the Fourth and Fourteenth Amendments.

[2] Since this case is on appeal from the grant of summary judgment for respondents, the facts are taken from the affidavits and papers before the district court with all factual inferences construed against respondents and in favor of petitioners. *See Adickes v. Kress and Co.*, 398 U.S. 144, 158-59 (1970).

renew their lease unless the park owner obtained a judicial order evicting them. Ill. Rev. Stat. Ch. 110 §9-101 *et seq.* Such an order could be obtained only if the park owner proved specific grounds for nonrenewal or termination of the lease "such as violation of park rules, health and safety code or irregular or non-payment of rent." Ill. Rev. Stat. Ch. 80 §208.

In May, 1987, Terrace Properties filed an eviction proceeding against petitioners in the Circuit Court of Cook County. This suit was dismissed on June 2, 1987. In August, 1987, Terrace Properties and Hale filed another eviction proceeding against petitioners, seeking possession of their lot but claiming no unpaid rent. The case was set for trial on September 22, 1987. R.56, Attachment B.

Then, in early September, 1987, Terrace Properties and Hale decided that they were going to evict the Soldals immediately, in violation of Illinois law and the Soldals' right to continued possession of their lot, by towing their trailer home out of the park. On September 4, they informed the Cook County Sheriff's Department that they were about to physically evict the Soldals, and requested the presence of Cook County sheriff deputies because they expected that the Soldals might try to resist. R.56, Statement of Facts ¶ 7; R.56, Attachment C. The Cook County Sheriff's Department agreed to send deputy sheriffs to the mobile home park to ensure that the removal of the mobile home was accomplished without any incidents. R.56, Statement of Facts ¶ 9; R.56, Attachment C.

At about 1:00 p.m. on September 4, two employees of respondent Terrace Properties arrived at petitioners' home accompanied by Cook County deputy sheriff Shawn O'Neill.[3] O'Neill had been ordered to the scene by Cook County sheriff's captain Jackson pursuant to the request from Terrace Properties and Hale. R.56, Statement of Facts ¶ 10; R.56, Attachment C; R.56, Attachment E, p. 12-15. Deputy sheriff O'Neill parked his car in the street outside petitioners' home, while the Terrace Properties' employees began pounding on the trailer and "started to tear our place apart . . . Yanking the sewer box, the water box off the side of the trailer." R.56, Attachment E, p. 13-15 (deposition of Edward Soldal).

When Edward Soldal asked the employees "What are you doing?" one employee told Mr. Soldal "to ask the sheriff deputy" and continued "ripping our trailer apart." R.56, Attachment E, p. 16. Mr. Soldal turned around and found that deputy sheriff O'Neill had exited his car and was standing behind him. When Mr. Soldal asked him "What are you going to do about this?" O'Neill replied that "he was there to see that I didn't interfere with Willoway's workers." R.56, Attachment E, p. 17-18. Mr. Soldal then asked "Are you just going to stand there while they destroy our home?" and the deputy answered "I'm just doing what the chief told me." R.56, Attachment

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[3] The name of deputy sheriff O'Neill was discovered by petitioners pursuant to discovery materials received from Terrace Properties Inc. and Hale. At the time the case was dismissed as to all defendants, there was a pending Motion to Amend the complaint to add O'Neill as a defendant, in place of Officer Doe. R.46. The district court ruled that this motion was moot. R.67.

E, p. 17-18. At the time he made these statements deputy sheriff O'Neill knew that the eviction was unlawful. R.56, Attachment C. Mr. Soldal then took photographs of the Willoway employees taking the trailer apart while deputy O'Neill watched. R.56, Attachment E, p. 19. Next, Mr. Soldal attempted to telephone his lawyer, but as the phone rang the line went dead, because it was cut. He left his home and called from a pay phone. His lawyer contacted the Sheriff's Department and spoke to respondent Cook County sheriffs Chief Wittsman and Captain Levy who both claimed that the department was unaware that any deputy sheriffs were at the mobile home park. R.56, Attachment E, p. 24. In fact the Sheriff's Department did know this. R.56, Attachment C.

Mr. Soldal then received a phone call from either Wittsman or Levy, who again claimed that no deputy sheriffs were at the park. R.56, Attachment E, p. 24-25. Next, Mr. Soldal talked again to his lawyer who told him that Levy, Wittsman, and another deputy sheriff had said that they were going to put a stop to the eviction. R.56, Attachment E, p. 25-26.

But when Mr. Soldal returned to his home he found that the Terrace Properties' employees, in the presence of deputy sheriff O'Neill, "had torn (the mobile home) almost completely apart. And they had hooked a tractor to it and was trying to yank it out of its spot. They had torn all the skirting off; they had torn down the canopy." R.56, Attachment E, p. 26-28. Mr. Soldal left to call his lawyer again. She made more calls to the Sheriff's Department and advised Mr. Soldal to return to the trailer park and sign a complaint against Terrace Properties for criminal damage to property. R.56, Attachment E, p. 35-37.

When Mr. Soldal returned to his home he found two more deputy sheriffs in the area in addition to O'Neill.[4] R.56, Attachment E, p. 38. He said he wished to file a complaint and one of the deputies, probably respondent deputy sheriff Hunt, told him to see respondent deputy sheriff Lieutenant Jones who was at the Willoway office. R.56, Attachment E, p. 38-39, 84-86. Mr. Soldal went to the Willoway office and found Lieutenant Jones meeting with Hale and employees of Terrace Properties. Lieutenant Jones directed Mr. Soldal to wait outside while he remained inside the office with Hale and the employees for a further 20 to 30 minutes with the blinds on the office windows drawn shut. R.56, Attachment E, p. 40-42.

When Jones eventually emerged from the office, Mr. Soldal told him that he wished to sign a complaint against Willoway. Jones said he had to talk to a district attorney and went back into the Willoway office for an additional thirty minutes. R.56, Attachment E, p. 45. When he came out again, Jones refused to allow Mr. Soldal to sign a complaint and told him that "it was between the landlord and tenant; that they were going to go ahead and continue to move out the trailer." R.56, Attachment E, p. 46.

Mr. Soldal returned to his home and found it had suffered further serious damage and that there were now four deputy sheriffs at the scene. R.56, Attachment E, p. 51-54. Eventually the Willoway workers managed to pull loose petitioners' home and tow it onto the street. R.56,

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[4] Because of a discovery stay ordered by the district court and the failure of the deputy sheriffs to timely answer discovery, petitioners do not know the names of these officers.

Attachment E, p. 55-56. Mr. Soldal returned to the Willoway office where he saw Jones talking to Hale. When Jones saw Mr. Soldal he stopped talking to Hale and told him that "they were working on where they were going to put the trailer," and when Soldal said they needed the trailer for a place to sleep Jones said "they were going to set us up at the YMCA." R.56, Attachment E, p. 56-57. When an employee of Willoway stated that the trailer was to be left on the street, Jones told him he could not do that. R.56, Attachment E, p. 58.

Mr. Soldal returned to his home, where two deputy sheriffs were still present, then went back to the Willoway office where he saw Hale and Jones, who were again talking together. R.56, Attachment E., p. 67-68. Mr. Soldal asked Jones where his home was going to be and Jones stated "that they were going to move the trailer and work out some place to stay. He said, either the YMCA or a motel or something he said . . . He just said, you know, to get your children together and, you know, leave the park." R.56, Attachment E, p. 69-70. Hale then looked at Jones and said "I'm going to tell him this in front of you, that he's not allowed to come back in the park," and Jones said to Mr. Soldal, "Now, you heard what she said." R.56, Attachment E, p. 70-71. Jones then told Mr. Soldal that he would let him know where he would be staying, and later told him that deputy sheriff Hunt would escort the Soldals to a motel, and that his trailer would be locked up in a construction company yard. R.56, Attachment E, p. 71, 80, 91-93.

Deputy sheriff Hunt then instructed Mr. Soldal to follow him in his car, and drove 8 to 10 miles to a motel. Mr. and Mrs. Soldal and their twin babies stayed at the

motel that night, while their two older children stayed the night with friends at Willoway. R.56, Attachment E, p. 93, 101. That night, Mr. Soldal attempted to file a complaint with the Sheriff's Department that his trailer had been taken and locked up by Willoway. Respondent deputy sheriff Vaid stated "You're the guy that had the trailer pulled out of Willoway today," and refused to let Mr. Soldal file a complaint. R.56, Attachment E, p. 128-135.

The next morning, September 5, 1987, Mr. Soldal returned to Willoway to pick up his children. On his way into the park he saw Hale. R.56, Attachment E, p. 101. While Mr. Soldal was at his friends' house getting his children, deputy sheriff Haritos came to the door, said "You're not supposed to be here," arrested and handcuffed Mr. Soldal, and told Mr. Soldal's children that their father was going to jail and they were going to a foster home. R.56, Attachment E, p. 103-107. Shortly thereafter, deputy sheriff Hunt arrived in a squad car with Hale, and Haritos went to talk to them while Mr. Soldal and his children were placed in a squad car. R.56, Attachment E, p. 108-109.

Haritos then drove the squad car to the Willoway office and went into the office with Hunt and Hale, while Mr. Soldal, who was still handcuffed, was left in the squad car with his two children. R.56, Attachment E, p. 110-111. After about an hour, Hunt emerged from the office and said he was taking the children to the motel and Mr. Soldal to jail. R.56, Attachment E, p. 112. Mr. Soldal was then jailed for about four hours.

On September 9, 1987, Judge Sophia H. Hall of the Circuit Court of Cook County found that Terrace Properties Inc., "without following the requirements of the

forcible entry and detainer statute, and without any other authority, forcibly removed (Mr. Soldal's) trailer from (Terrace Properties Inc.'s) lot 24 on September 4, 1987, after disconnecting (Mr. Soldal's) utilities," and entered an order requiring Terrace Properties Inc. to return petitioners' home to its original location. R.56, Attachment D. Eventually, the home was returned, but in badly damaged condition. Mr. Soldal attempted to file a criminal complaint based on the extensive damage to the trailer but deputy sheriff Vaid refused to allow this. R.56, Attachment E, p. 136-137.

Throughout the entire incident on September 4, 1987, Chief Wittsman, Captain Jackson, Captain Levy, Lieutenant Jones, Officer Hunt, Officer O'Neill and the unidentified deputy sheriffs knew that petitioners had the legal right to remain at Willoway and that there was no order authorizing their eviction. R.56, Attachment C; R.56, Attachment E, p. 25-26, 35-37.

The eviction proceedings which had originally been scheduled for trial on September 22, 1987, were tried on November 10, 1987. After evidence was presented, judgment on the merits was entered in favor of the Soldals and the trailer remained at the park. R.1, ¶ 24. However, because of the extensive damage to the trailer and the failure of Terrace Properties to repair it, the trailer was uninhabitable during the winter and petitioners were forced to vacate their home and move it out of the park in December, 1987. R.1, ¶ 25-27.

All criminal charges against Mr. Soldal were dismissed on February 23, 1988 when Mr. Soldal demanded

trial and the prosecutor elected not to pursue the charges. R.1, ¶ 28.

PROCEEDINGS BELOW

In the district court, respondent deputy sheriffs and two individual defendants moved for summary judgment on the grounds, *inter alia*, that the private parties, not the deputy sheriffs, had seized and removed petitioners' home, and that the facts did not support a finding of conspiracy or joint action between the private parties and the deputy sheriffs. Therefore, these defendants argued, the home was not seized under color of state law under 42 U.S.C. §1983. R.38. The district court accepted this argument, granted the motion, and entered judgment in favor of all defendants on all counts. R.67, Appendix C.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit, arguing that the facts did show sufficient joint action to sustain the §1983 claim. The majority opinion, written by Judge Posner, accepted petitioners' argument on this issue, but held that this aspect of petitioners' complaint should nevertheless be dismissed because the seizure of petitioners' home did not violate any of their constitutional rights. J.A. 41-42.[5] In dissent, Judge Flaum argued that the facts showed violations of both petitioners' Fourth Amendment right to be free from unreasonable seizures and their Fourteenth Amendment right to substantive due process. J.A. 45-51.

[5] The court reversed and remanded on other aspects of plaintiff Edward Soldal's claims which are not at issue here.

Petitioners sought rehearing and the court of appeals vacated the panel opinion and granted rehearing *en banc*. 931 F.2d 445 (7th Cir. 1991). The case was reargued and, by a 6-5 vote, the court, in an opinion again written by Judge Posner, reaffirmed the panel decision, elaborated on its holding that there was no Fourth Amendment violation, and reinstated the panel opinion in all other respects. J.A. 52-68. The majority acknowledged that petitioners' house had been seized, but held that this seizure did not implicate the Fourth Amendment. The majority held that no privacy interests of petitioners had been violated because neither their home nor property had been searched and because they were not suspected of criminal wrongdoing. The opinion conceded that petitioners' possessory interests in their house and effects had been violated, but held that the Fourth Amendment does not protect such interests, which can be vindicated, if at all, only through a Fourteenth Amendment procedural due process claim. The court further noted that petitioners had not brought such a claim, but that, if they had, it would have failed because state law potentially provided some relief for the deprivation they had suffered.

Judge Flaum's dissent, joined by four other members of the court, asserted that the Fourth Amendment does protect possessory interests, that it should make no difference that petitioners were not suspected of a crime, and that the Soldals' privacy interests protected by the Fourth Amendment were violated when the sheriffs eliminated that privacy by removing their home. J.A. 71-89. The dissent also argued that petitioners had set forth a

valid Fourteenth Amendment substantive due process claim. J.A. 87.

SUMMARY OF ARGUMENT

The Fourth Amendment's prohibition of unreasonable seizures applies whether or not the seizure occurs in the course of an investigation into possible violations of criminal laws, and a seizure may be unreasonable under the Fourth Amendment if it affects either possessory or privacy rights. The Seventh Circuit's holding that the Fourth Amendment was inapplicable in this case, no matter how unreasonable the seizure, because the Soldals were not suspected of a crime, and on the ground that no Fourth Amendment interests were implicated by the seizure, is contrary to the language and history of the Fourth Amendment and prior decisions of this Court. The seizure of petitioners' home and its contents violated both their privacy rights to pursue their everyday lives, and their possessory rights in their home. Each of these rights is protected by the Fourth Amendment and, therefore, the seizure must be evaluated under the Fourth Amendment's reasonableness standard.

Petitioners' claim was not a procedural due process claim and did not have to be brought as such. The claim was for unreasonable seizure of petitioners' home, not for violation of procedure. Even if petitioners did have a procedural due process claim, this did not bar them from also pursuing a claim directly under the Fourth Amendment. Because petitioners were not bringing a procedural due process claim the existence of potential state law

remedies was irrelevant; such remedies did not affect petitioners' right to proceed based on a claim under a specific clause of the Bill of Rights or a violation of Fourteenth Amendment substantive due process. Finally, the fact that petitioners were tenants whose entitlement to possession of their home rested in part on rights arising under state law did not diminish their protection under the Fourth Amendment.

In addition to their Fourth Amendment claim, petitioners also asserted a viable claim for violation of their substantive due process rights under the Fourteenth Amendment. The seizure and extensive damaging of petitioners' property violated their rights under the Fourteenth Amendment to be protected from intentional deprivations of property without due process.

ARGUMENT

I. THE SEIZURE OF PETITIONERS' HOUSE AND ITS CONTENTS BY DEPUTY SHERIFFS WAS GOVERNED BY THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEIZURES.

A. The Fourth Amendment Applies to All Seizures Whether Or Not They Occur in the Context of a Criminal Investigation.

The Fourth Amendment was drafted and enacted against the immediate backdrop of English struggles to defeat the government's untrammeled right to search and seize evidence and people to suppress political dissent, *Huckle v. Money*, 2 Wils. K. B. 206, 95 Eng. Rep. 763 (1763); *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (1766); *Money v.*

Leach, 3 Burr. 1742, 97 Eng. Rep. 1050 (1765); *Entick v. Carrington*, 19 State Trials 1 (1765), and North American opposition to general writs of assistance to colonial authorities to search for and seize goods upon which duties had not been paid. *Boyd v. United States*, 116 U.S. 616, 624-630 (1885); N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 51-78 (1937) (hereafter "Lasson"); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 398 (1974); Frankael, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 361-68 (1920-21).[6]

The Amendment was not primarily directed towards protecting the rights of accused felons, *see e.g.*, Quincey's Mass. Rep. 471 (1865); T. Taylor, *Two Studies in Constitutional Interpretation*, 39 (1969), but rather to "protecting the homes of ordinary persons against indiscriminate and unreasonable governmental invasions." Barrett, *The Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 71; *Abel v. United States*, 362 U.S. 217, 254 (1960) (Brennan J. dissenting). "(T)he English cases that inspired the Fourth Amendment were not criminal cases in which a defendant was seeking to escape conviction; they were tort cases in which the victims of unreasonable searches were seeking damages for invasion of their lawful interests." Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 52. Thus, it is clear that at the time of its passage the Fourth Amendment was seen principally as regulating governmental

[6] The more distant antecedents of the Fourth Amendment include protection of the home and property in Biblical, Roman and early English law. Lasson, p. 13-19.

activities that did not involve criminal law enforcement. Abuses in routine criminal law enforcement were not an impetus towards its enactment. The Fourth Amendment was seen as a check on the power of government agents to arbitrarily seize goods in non-criminal law enforcement activities such as tax collection.

Although there have been occasional decisions of this Court suggesting that the Fourth Amendment does not apply except in criminal cases or investigations, the majority of decisions, and all the more recent ones, reject any distinction based upon the motivation for the search or seizure. For example, in the landmark case of *Boyd v. United States*, 116 U.S. 616 (1885), the Court held that the Fourth Amendment was applicable in a non-criminal forfeiture case and that statutes compelling production of documents upon pain of forfeiture were unconstitutional under the Fourth and Fifth Amendments. The Court specifically noted that "the entry upon premises, made by a sheriff . . . for the purpose of seizing goods and chattels *by virtue of a judicial writ*," 116 U.S. at 624 (emphasis added), was not a Fourth Amendment violation, stressing the importance of a judicial writ and never suggesting that the Fourth Amendment did not apply to civil repossessions by law enforcement officers. However, dicta in *Murray's Lessee et al. v. Hoboken Land and Improvement Co.*, 18 How. 272, 285 (1855), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1892), suggested that the Fourth Amendment might have no relevance in civil proceedings or outside a criminal prosecution. But in *American Tobacco Co. v. Werkmeister*, 207 U.S. 284 (1907), where the Court refused to consider a claim that seizure of a painting by a United States Marshal acting pursuant to a

writ of replevin obtained by a private party was a Fourth Amendment violation, the only ground for the decision was that the plaintiff had waived the issue by failing to raise it at trial, with no suggestion that the Fourth Amendment was inapplicable in a civil context. *Id.* at 301.

Then, in *Weeks v. United States*, 232 U.S. 383 (1914), the Court explicitly held that the protection of the Fourth Amendment "reaches all alike, whether accused of crime or not," 232 U.S. at 392, and in *Go-Bart Co. v. United States*, 282 U.S. 344 (1930), where no criminal case against the plaintiff was pending or contemplated, the Court held that the Fourth Amendment "protects all, those suspected or known to be offenders as well as the innocent . . . " 282 U.S. at 357.

With the growth of administrative regulatory power, the amount of governmental activity in non-criminal law enforcement increased and the question of the scope of Fourth Amendment arose more frequently. Before this Court dealt directly with the issue, the D.C. Circuit concluded that the Fourth Amendment applied to noncriminal administrative inspections. *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950). There, the court described the proposition that the Fourth Amendment was designed to protect only criminals as "preposterous. . . . To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection is a fantastic absurdity." *Id.* at 16-17. This opinion was generally praised by commentators, one of whom noted that:

> the right to be left alone is probably the fundamental principle involved in the Fourth Amendment, see Brandeis, J., dissenting in *Olmstead v. United States*, 277 U.S. 438 at 478 (1928), and thus it matters little whether a policeman or a health inspector intrudes. Historically it was probably the abuses of the general warrant which led to the adoption of the Fourth Amendment, but the individualistic spirit of that age would have rebelled equally at non-criminal invasions of the home unknown in 1789 when government was simpler.

63 Harv. L. Rev. 349, 350 (1949); *see also* 3 Vand. L. Rev. 820, 822 (1950) (applauding *Little* decision and describing restriction of the Fourth Amendment to criminal law enforcement as "strange").

But in *Frank v. Maryland*, 359 U.S. 360 (1958), four justices of this Court held that the Fourth Amendment was not a defense to a conviction for failing to allow a warrantless health inspection, stating that such inspections "touch[ed] at most upon the periphery of the important interests safeguarded by the [Fourth and] Fourteenth Amendment's protection against official intrusion," and holding that a warrant was therefore not required. Justice Whittaker concurred in the judgment, holding that the Fourth Amendment did apply to the states but that the request to search was not unreasonable and was thus constitutional. *Id.* at 373-74. Four dissenting justices argued that the Fourth Amendment "protects the citizen against unreasonable searches and seizures by government, whatever may be the complaint," *id.* at 374, asserted that the Fourth Amendment had always previously been thought to protect privacy in the context of

civil litigation, *id.* at 375-76, and concluded that "the Fourth Amendment thus has a much wider frame of reference than mere criminal prosecutions." *Id.* at 377.

The *Frank* holding lasted eight years. Then, in *Camara v. Municipal Court*, 387 U.S. 523 (1966), this Court re-examined whether administrative inspection programs were governed by the Fourth Amendment and overruled *Frank*. The Court held that "it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior," *id.* at 530, and noted that "even the most law abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority." *Id.* at 530-531. *Camara* held that "administrative searches . . . are significant intrusions upon the interests protected by the Fourth Amendment," *id.* at 534, which generally required a warrant, but that a warrant could be justified based upon a reasonable area inspection and did not require an individualized showing of probable cause to inspect.

Thus, the teaching of *Camara* is that the Fourth Amendment applies to any search or seizure and that the ultimate standard is that expressed in the amendment itself – reasonableness. Whether a search or seizure is reasonable is determined by balancing the governmental interest in the search or seizure against the extent of the invasion. *Id.* at 536-539. *Camara* involved searches, not seizures, but the Court nowhere indicated there should be any distinction between the two in terms of the applicability of the Fourth Amendment. *Camara* is also important, in light of the facts in this case, because it noted that

the appellant's status as a tenant did not diminish his Fourth Amendment rights, and that the landlord's consent to the inspection did not authorize inspection of appellant's premises. *Id.* at 540.

Since *Camara* there have been numerous decisions of this Court discussing the constitutionality of searches and seizures that were not performed for criminal law enforcement. *See*, Schulhoffer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 Sup Ct. Rev. 87. In every case the Court has held that the governmental activity must be judged against the Fourth Amendment's standard of reasonableness. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); *Wyman v. James*, 400 U.S. 309 (1970); *United States v. Biswell*, 406 U.S. 311 (1972); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Donovan v. Dewey*, 452 U.S. 594 (1981); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New York v. Burger*, 482 U.S. 691 (1987); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executive's Association*, 489 U.S. 602 (1989). In some of these cases the search or seizure was deemed reasonable under the Fourth Amendment, in some it was not. But each case was clear that the search or seizure must be evaluated under Fourth Amendment standards, and that the fact that the invasion was not motivated by a criminal investigation was irrelevant in determining that the Fourth Amendment applied. Indeed, the constant theme throughout these cases is the rejection of the "anomalous" position that "the individual and his private property are fully protected by the Fourth

Amendment only when the individual is suspected of criminal behavior." *O'Connor v. Ortega*, 408 U.S. 709, 715 (1987) and *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1984) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967)). Moreover, in none of this Court's prior cases has there been any suggestion that, while the criminal or non-criminal context in which the invasion occurred is irrelevant in determining the Fourth Amendment's applicability to "searches", it is somehow relevant to "seizures."

There are very few cases in which this Court has held that a search or seizure need not be measured against Fourth Amendment standards, *i.e.* that the Fourth Amendment just is not in the picture. One was the "law enforcement" search and seizure in *Hudson v. Palmer*, 468 U.S. 517 (1983). There, the Court noted its "caution in approaching claims that the Fourth Amendment is inapplicable in a given context," *id.* at 525, but held that "prisoners have no legitimate expectation of privacy and therefore the Fourth Amendment's prohibition of unreasonable searches does not apply in prison cells." *Id.* at 530. Significantly, the Court equated searches and seizures, holding that "the same reasons that lead us to conclude that the Fourth Amendment's proscription against unreasonable searches is inapplicable in a prison cell, apply with controlling force to seizures." *Id.* at 528 n. 8; *see also, id.* at 538 (O'Connor, J., concurring) ("[A]rrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects"). *Hudson* thus holds that prisoners have no Fourth Amendment privacy or possessory rights; contrary to the Seventh Circuit's holding, *Hudson* has no

bearing on the applicability of the Fourth Amendment to non-law enforcement searches and seizures, and does not hold that the Fourth Amendment protects only privacy interests.

Other cases in which the Fourth Amendment is not applicable include those involving "open fields," where the Court has noted that the amendment protects "persons, houses, papers, and effects" and not real property *per se*, *see e.g.*, *Hester v. United States*, 265 U.S. 57 (1924); *Oliver v. United States*, 466 U.S. 170 (1984), or where a person has abandoned property. *See, California v. Greenwood*, 486 U.S. 35 (1987). Of course, there are numerous other cases in which a Fourth Amendment claim has been rejected, but in each of them the invasion was measured against the reasonableness or warrant requirement of the Fourth Amendment, and either the search or seizure was found to be constitutional or the desired remedy – typically exclusion of evidence – was deemed inappropriate.

Thus, the history of the enactment of the Fourth Amendment and the holdings of this court establish that any governmental search and seizure must be measured against Fourth Amendment reasonableness standards.

In addition to being good law this approach also makes good sense. A seizure is a seizure, whether it occurs in the context of a criminal investigation or not. *Cf. Arizona v. Hicks*, 480 U.S. 321, 325 (1986) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."). A seizure affects a person's legitimate interests in security, secrecy and seclusion – the interests that the Fourth Amendment was designed to protect – in the same way whether the seizure is made for

purposes of criminal law enforcement, civil law enforcement, or not for law enforcement at all. The subjective motivation for the invasion is irrelevant in determining the applicability of the Amendment, although it may have some relevance in evaluating the governmental interest involved.

Making the applicability of the Fourth Amendment depend on the intent of the seizing officers can lead to absurd results, as the present case illustrates. If the sheriffs had contended that they seized, but did not search, petitioners' home because they suspected it had drugs inside, the seizure would, under the Seventh Circuit's reasoning, be actionable under the Fourth Amendment and the seizure would have had to be authorized by a warrant or otherwise be reasonable. *See, e.g., United States v. Place*, 462 U.S. 696 (1982). Since there was no such suspicion, and the Soldals were entirely law abiding, the Seventh Circuit would deny them the protection of the Fourth Amendment, although the Soldals' privacy and possessory interests were affected in precisely the same way as if they had been suspected criminals. The only interest that is affected differently under these two scenarios is the "right" to be criminal, a "right" which the Fourth Amendment manifestly does *not* protect. *U.S. v. Jacobsen*, 466 U.S. 109, 123 (1984). The reasoning of the Seventh Circuit majority thus stands the meaning of the Fourth Amendment on its head.

It is against this background of the universality of the Fourth Amendment, a background that was either ignored or rejected by the Seventh Circuit when it held that the law-abiding have fewer rights under the Fourth Amendment than the suspected criminal, J.A. 67, that the

seizure of the Soldals' home must be measured. When viewed in this way, it is clear that the fact that the Soldals were not suspected of any criminal wrongdoing was irrelevant to whether the seizure of their home was governed by the Fourth Amendment.

B. The Fourth Amendment Protects Possessory Rights.

The Seventh Circuit's holding that the Fourth Amendment does not protect possessory rights is contradicted by the language of the Fourth Amendment and this Court's prior holdings. It is well established that if a seizure violates a person's possessory rights in a type of property protected by the Fourth Amendment the seizure must be evaluated under the Fourth Amendment's standard of reasonableness.

The first clause of the Fourth Amendment – "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . " – appears by its language to protect possessory interests in the property described, i.e. houses, papers and effects. "Secure" means "not exposed to danger," "safe," *Blacks Law Dictionary* 1521 (4th ed. 1951), and connotes peaceful possession, while "seizure" means an "intentional acquisition of physical control," a "willful" "detention or taking." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). Thus, a seizure of "houses, papers and effects" simply means an intentional taking of that property, and the plain words of the Fourth Amendment forbid such a seizure if it violates a person's peaceful possession and is unreasonable.

This Court has always interpreted this clause in accordance with these uncomplicated words. The Court has seen it as protecting two different and distinct expectations: privacy interests, which can be violated by searches *and* seizures, *United States v. Place*, 462 U.S. 696 (1982), and possessory interests, which are violated by seizures. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Texas v. Brown*, 460 U.S. 730, 747 (1982) (Stevens J., concurring); *Maryland v. Macon*, 472 U.S. 463, 469 (1984); *Arizona v. Hicks*, 480 U.S. 321, 323 (1986); *Horton v. California*, 496 U.S. 128 (1990). Both of these interests are important and neither trumps the other. "Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, see *Texas v. Brown*, 460 U.S. at 747-748 (Stevens, J., concurring in judgment), neither the one nor the other is of inferior worth or necessarily requires only lesser protection." *Arizona v. Hicks*, 480 U.S. 321, 328.

The majority of this Court's Fourth Amendment cases have involved searches, or searches and seizures, and thus have stressed the privacy interests protected by the Fourth Amendment. But when faced with a seizure alone, this Court has always held that the violation of a right of ownership, without any implication of privacy rights, is subject to the Fourth Amendment's prohibition of unreasonable seizures. "In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing

the items to be seized." *United States v. Place*, 462 U.S. 696, 701 (1982).

Although *Katz v. United States*, 389 U.S. 347 (1967), stressed the importance of looking to reasonable expectations of privacy rather than simple possessory interests in evaluating the constitutionality of searches, the Court was clear that Fourth Amendment "protections go further [than protecting individual privacy], and often have nothing to do with privacy at all." 389 U.S. at 350. In support of this point the Court quoted the dissenting opinion of Justice Black in *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965), that "the average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth." 389 U.S. at 350 n. 4.

That *Katz* did not remove possessory interests from Fourth Amendment protection was pointed out the following year in *Alderman v. United States*, 394 U.S. 165 (1968). There, the Court held that a homeowner's Fourth Amendment rights were violated by unauthorized surveillance of conversations in his home, even though he himself was not a participant in the conversations. The opinion stressed that *Katz* had decided that the Fourth Amendment "protects a person's private conversations *as well as* his private premises," *id.* at 178 (emphasis added), and "was not intended to withdraw any of the protection which the Amendment extends to the home." *Id.* at 180. In *Alderman*, no privacy rights of the homeowner were implicated yet his possessory interests were adequate to establish a Fourth Amendment violation and entitle him to suppression of evidence of conversations of others.

The distinction between the different interests implicated by "searches" and "seizures" has been exhaustively discussed in several "plain view" cases. In *Texas v. Brown*, 460 U.S. 730 (1982), for example, then Justice Rehnquist noted that, although the seizure of an object in plain view involves no invasion of privacy since the police are already legitimately on the premises, either because of a warrant or some exception to the warrant clause, such a seizure "does implicate the Amendment's limitations upon seizures of personal property." *Id.* at 738 n. 4. And, in *Horton v. California*, 496 U.S. 128 (1990), the Court noted, in relation to Fourth Amendment protections, that:

> If an article is already in plain view, neither its observation nor its seizure would involve any invasions of privacy. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Illinois v. Andreas*, 463 U.S. 675, 771 (1983). A seizure of the article, however, would obviously invade the owner's possessory interest. *Maryland v. Macon*, 472 U.S. 463, 469 (1985); *United States v. Jacobsen*, 466 U.S. 109, 113.

496 U.S. at 133-34. Much of the discussion in *Horton* involved possessory interests alone, a discussion and issue that would have been superfluous if the Amendment did not protect such interests. In rejecting the holding of the plurality in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), that there was an inadvertence requirement for a valid plain view seizure, *Horton* quoted from Justice White's dissent in *Coolidge* wherein he stressed that the extent of interference with *possessory* rights is the same whether or not the police expect to find the seized evidence. *Horton*, 496 U.S. at 139 (quoting *Coolidge*, 403 U.S. at 516 (Justice White dissenting)). The *Horton* opinion

pointed out that once the privacy concerns of a valid search have been satisfied, the *Coolidge* inadvertence requirement furthers no additional Fourth Amendment interest, 496 U.S. at 140, obviously referring to possessory rights.[7]

This is also the holding of seizure cases. In *United States v. Place*, 462 U.S. 696 (1982), the Court held unanimously that a warrantless ninety minute detention of the petitioner's luggage, based upon reasonable belief but not probable cause that the luggage contained narcotics, was unreasonable. The Court noted that this seizure intruded upon two different interests of the petitioner – his "possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.* at 708. In *United States v. Jacobsen*, 466 U.S. 109 (1983), the Court relied on the distinct interests protected by the prohibitions against "searches" and "seizures" in holding that the Fourth Amendment's prohibition against unreasonable seizures could be violated apart from any violation of privacy interests. *Id.* at 124-125. The Court defined a seizure of property as "some meaningful interference with an individual's possessory interests in that property," *id.* at 113, and evaluated the seizure of a minute amount of cocaine under a Fourth Amendment reasonableness standard, even after the Court had concluded that no privacy interests had been violated.

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[7] Just as *Horton* held that the inadvertence requirement of *Coolidge* furthered no Fourth Amendment interest, so too the Seventh Circuit's requirement that the seizure occur in the context of a criminal investigation bears no relation to, and in fact undermines, the purpose of the Fourth Amendment.

Rakas v. Illinois, 439 U.S. 128 (1978), is not to the contrary. There, armed robbery defendants attempted to suppress evidence – a sawed off rifle and shells – which was found by police in the locked glove compartment and under the seat of a car in which the defendants were passengers. This Court held that the search did not violate their Fourth Amendment rights because "they asserted neither a property *nor a possessory interest* in the automobile, nor an interest in the property seized," *id.* at 148 (emphasis added), and had no legitimate expectation of privacy in the areas searched. *Id.* at 149. *Rakas* dealt only with the search of the car, not the seizure of the rifle and shells, since the petitioners did not claim that they owned the seized items. *Id.* at 130-131.[8] Nevertheless, the Court noted that a person with no expectation of privacy in an area searched could validly contest a seizure "if their own property were seized during the search." *Id.* at 142 n.11.

In *United States v. Salvucci*, 448 U.S. 83 (1979), where defendants challenged a search pursuant to a warrant of one defendant's mother's home, in the course of which 12 stolen checks were seized, the Court held that "legal possession of a seized good . . . does not invariably

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[8] Presumably, however, even if petitioners in *Rakas* had claimed ownership that would not have invalidated the seizure, providing that the search did not violate their Fourth Amendment rights. In that case, the police would have observed evidence the "incriminating character" of which was "immediately apparent," *Horton v. California*, 496 U.S. at 136, so as to justify its seizure as reasonable, based on probable cause. *Arizona v. Hicks*, 480 U.S. 321; *Texas v. Brown*, 460 U.S. 730, 739.

represent the protected Fourth Amendment interest," but that "property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated." *Id.* at 91. Because *Salvucci* was a search case, the Court was concerned with whether the defendants had a reasonable expectation of privacy in the area searched rather than whether they had possessory rights in the seized goods. Nevertheless, the Court's discussion of property rights shows their continued importance in evaluating Fourth Amendment violations.

It is also noteworthy that different courts of appeals have consistently held that violations of property interests must be evaluated against the Fourth Amendment reasonableness standard, even in the absence of any violation of privacy interests. *See, e.g., Autoworld Specialty Cars v. United States*, 815 F.2d 385, 389 (6th Cir. 1987) (seizure of cars from a public showroom infringing "purely possessory interests in the vehicles" was governed by the Fourth Amendment); *United States v. Bagley*, 772 F.2d 482, 490 (9th Cir. 1985) (towing of a lawfully parked car constituted a Fourth Amendment seizure); *United States v. Roberts*, 644 F.2d 683 (8th Cir. 1980) (seizure of marijuana from a rental storage unit was a Fourth Amendment violation where no privacy interest was involved); *United States v. Allen*, 644 F.2d 749 (9th Cir. 1980) (officer's seizure of a suitcase constituted a Fourth Amendment violation warranting suppression of the drugs found therein, notwithstanding that the subsequent search was conducted pursuant to a valid warrant); *United States v. Cagle*, 849 F.2d 924 (5th Cir. 1988) (ninety

minute detention of a suitcase at an airport was an unreasonable seizure under the Fourth Amendment).[9]

It is thus clear from the history, text, and interpretation of the Fourth Amendment that it protects property interests in the types of property denominated by the Fourth Amendment – houses, papers and effects – separately from, and in addition to, privacy interests. Once this is accepted, it cannot be questioned that the Amendment protects the property interests of petitioners here – plenary ownership rights in their trailer home and its contents. This case does not raise the question of what lesser possessory rights are protected by the Amendment. Such interests range from the absolute ownership here, through lawful possession without ownership, to long-standing and legal but unauthorized possession, and end at unauthorized illegal possession. Each of these possessory interests have a differing level of protection under the Fourth Amendment, possibly corresponding to whether the possessor had an expectation of continued possession that society was prepared to consider reasonable, or whether there was "any significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). But *this*

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[9] Commentators share this conclusion. *See, e.g.*, Posner, *Rethinking the Fourth Amendment, supra*, at 50-51 (The Fourth Amendment appears to include "both (1) property interests of the sort traditionally protected by tort actions for conversion and for trespass to real and personal property; and (2) interests in bodily integrity, mental tranquility, and freedom of movement. . . . This seems to me the minimum content of the Fourth Amendment . . . "); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173; Fritzler, *Optimality in Fourth Amendment Law*, Am. Cr. L. Rev. 27:473, 488-89 (1990) (hereafter "Fritzler").

case, presenting the highest level of possessory rights that is possible, clearly qualifies for Fourth Amendment protection.

Since the Fourth Amendment protects possessory interests alone, the holding of the Seventh Circuit must be reversed and the case remanded for a trial at which a jury can determine the reasonableness under the Fourth Amendment of the seizure of petitioners' house, papers and effects.

C. The Seizure of Petitioners' House, Papers and Effects Violated their Fourth Amendment Privacy Rights.

The court of appeals held, as a matter of law, that the seizure of petitioners' house, papers and effects and the wholesale disruption of their lives did not violate their privacy rights protected by the Fourth Amendment. This decision is completely at odds with the type of privacy interests traditionally protected by the Fourth Amendment and also violates petitioners' right to have a jury determine this issue.

This Court has consistently held that the Fourth Amendment protects a person's privacy interest in his lawful activities. The clearest example is *United States v. Place*, 462 U.S. 696 (1982). There, officers suspected that Place's luggage contained narcotics and temporarily seized it to obtain a warrant and/or have the bag sniffed by a trained narcotics detection dog. Ninety minutes after the seizure, the dog reacted positively to one bag and the luggage was detained over the weekend until a search warrant could be obtained; the luggage was then opened

and cocaine was discovered. In determining that the seizure was unreasonable under the Fourth Amendment, the Court looked to "the manner in which the seizure was conducted," *id.* at 707, the effect of the seizure on Place's travel plans and the extent to which it effectively restrained his freedom of activity, *id.* at 708, the length of the property detention, and the diligence of the police in pursuing their investigation. *Id.* at 709-10. The Court rejected any automatic rule that property seizures are less intrusive than seizures of the person, noting that the facts presented in *Place* did not support such a finding. *Id.* at 708.

Place and the Seventh Circuit's opinion in *Soldal* are incompatible. In *Place*, this Court found that the seizure of effects for ninety minutes based on reasonable suspicion was unreasonable and violated the Fourth Amendment. The temporary detention undoubtedly inconvenienced Place and made it more difficult for him to reach his destination in a timely fashion, but that was the extent of the intrusion on his privacy interests. Here, petitioners' home was taken away for several days, and then was returned irreparably damaged. Petitioners' ability to pursue their everyday lawful activities, and to live and sleep in their home, was destroyed. All afternoon and evening on September 4, petitioners were forced to deal with the seizure and its aftermath; the next day, Mr. Soldal returned to the trailer park to pick up his children and was arrested. For several days after that, petitioners were deprived of their home, and when it was returned it was scarcely habitable. The effect of the seizure on their right "to be left alone" and to pursue their lawful activities without interference was substantial. Moreover, the

manner in which the seizure was conducted aggravated its unreasonableness. The sheriffs, and the private parties with whom they acted, were aware that there was no judicial order authorizing the dispossession and ignored the repeated protests from petitioners and their lawyer. The property was extensively damaged during the seizure and the trailer was rendered substantially uninhabitable. In addition, the length of the property detention was far greater than in *Place* and the sheriffs showed no diligence whatsoever in evenhandedly enforcing the law. Under every criterion listed in *Place*, this seizure was a gross violation of the Fourth Amendment.

Place can be distinguished from this case only if the criminal investigation context of the *Place* seizure is considered determinative. But as already demonstrated (*supra* at 15-25), the Fourth Amendment applies whether or not the seizure occurs in the course of a criminal investigation. If that factor is removed from consideration, it is obvious that the injury to the Soldals' privacy interests was far greater than the injury to the defendant in *Place*.

Moreover, the privacy violations suffered by petitioners here are precisely the type that commentators have identified as at the core of the Fourth Amendment. The right of privacy protected by the Fourth Amendment both includes, and is greater than, the right to secrecy. Judge Posner has previously noted that privacy "embrace[s] at least two distinct interests. One is the interest in being left alone. . . . The other privacy interest [is] concealment of information." Posner, *Rethinking the Fourth Amendment*, *supra*, at 51 n. 7; *see also*, R. Posner, *The*

Economics of Justice III, 272-73 (1981). The first interest can be described as the right of seclusion, the "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis J., dissenting), the second as the right to secrecy. There is a strong argument that both the historical background of the Fourth Amendment and contemporary social interests support giving greater protection to the right of seclusion than to the right of secrecy. While secrecy may assist fraud by concealing information that society has an interest in knowing, violation of seclusion is likely to disrupt socially useful activities. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, *supra*, at 174-76.

Professor Fritzler has described privacy costs from a Fourth Amendment violation as including "one's interest in privately pursuing lawful activities without interference, one's interest in not having property damaged or put into disarray by police intrusions and one's interest in being free from intrusions and observations that could cause embarrassment or loss of personal dignity." Fritzler, *supra*, at 477. Professor Fritzler argues that the privacy-related interest in the right to pursue lawful activities without interference is violated by any interference in a lawful activity, that the degree of intrusiveness of a search or seizure determines the degree to which the interest is harmed, and that, "in some settings, such as a home, there is a greater value attached to non-interference with one's activities." Fritzler, *supra*, at 504. Fritzler also notes the relationship between privacy and possessory interests:

> There are costs associated with destructive law enforcement behavior during a search or seizure. There is a privacy interest, perhaps more properly termed a property interest, in not having one's possessions taken away by police for any period of time. The degree to which this interest is interfered with depends upon the items which are taken and the length of time that their owner is deprived of their use.

Fritzler, *supra*, at 505.

There is thus no basis for the Seventh Circuit's conclusion that no privacy interests of petitioners were implicated here. Moreover, in reaching this conclusion and sustaining the grant of summary judgment, the Seventh Circuit made an unwarranted factual determination. Summary judgment is appropriate only if there is no genuine issue for trial; "if reasonable minds could differ as to the import of the evidence . . . a verdict should not be directed," *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250-51 (1986), nor should summary judgment be entered. It was for a fact finder to determine whether petitioners' reasonable expectations of privacy had been violated, a determination that should be made only after a full trial, not on a paper record where respondents did not even contest the existence of a privacy interest.

Here, five members of the court of appeals were firmly of the opinion that the facts did demonstrate a violation of privacy interests. The majority's holding, as a matter of law, that they did not, usurped the function of the jury. In this context, summary judgment was inappropriate and the case should be remanded to the district court for a full trial on the merits. *See, O'Connor v. Ortega*, 480 U.S. 709, 731-32 (Justice Scalia, concurring).

D. Petitioners' Fourth Amendment Claim Need Not Have Been Brought as a Procedural Due Process Claim.

The fact that petitioners were deprived of their property without procedural due process, and the existence of potential state law remedies, does not affect the viability of their Fourth Amendment claim.

In *Zinermon v. Burch*, 494 U.S. 113 (1989), the Court reaffirmed that:

> overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under §1983. A plaintiff, for example, may bring a §1983 action for an unlawful search and seizure despite the fact that the search or seizure violated the State's Constitution or statutes, and despite the fact that there are common law remedies for trespass and conversion.

494 U.S. at 124-25. Violations of a specific protection of the Bill of Rights, or of the substantive component of the Fourteenth Amendment Due Process Clause, are actionable based on the violation itself regardless of whether state law provides remedies. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961); *Zinermon v. Burch*, 494 U.S. at 125. It is only for certain types of procedural due process claims that the existence of remedies under state law may be relevant in providing all the process a plaintiff is due, thus undermining the plaintiff's claim. *Zinermon v. Burch*, 494 U.S. at 125; *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1983).

Here, however, the panel and *en banc* majorities, asserting that they were "perplexed" that petitioners did not bring their case as a state law trespass claim, did use the existence of state law remedies as a bar to the Fourth Amendment claim. J.A. 38, 56-57, 68.[10] The Seventh Circuit majority held that petitioners were really bringing a procedural due process claim, and that *Graham v. Connor*, 490 U.S. 386 (1989), mandated that the "dominant character of the conduct challenged in a §1983 case determines the constitutional standard under which it is evaluated." J.A. 66. Thus, the court held, petitioners had to bring their claim as one for denial of procedural due process even though such a claim was not brought and would probably fail. This argument is illogical and completely misreads *Graham v. Connor*.

First, *Graham v. Connor* nowhere holds that a plaintiff who has suffered deprivations of a number of constitutional rights is limited to litigating under only one and has to accept the court's determination as to which is "most appropriate." *Graham* held only that §1983 excessive force claims are governed by the heightened Fourth Amendment standard of reasonableness rather than by the Fourteenth Amendment substantive due process standard, under which it would be more difficult for a plaintiff to prevail. This Court has on numerous occasions evaluated conduct under several different constitutional provisions with no suggestion that the possibility of success under one negates the others. *See, e.g., Zinermon v. Burch*, 494 U.S. at 126; *FW/PBS Inc. v. Dallas*, 493 U.S. 215

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[10] Trespass as a remedy for illegal search and seizure by police has been described as "completely impotent" because of the limitation of damages. Foote, Remedies for Police Violations, 39 Minn. L. Rev. 493, 498 (1955).

(1990) (discussing challenges to an ordinance under the Fourteenth and Fourth Amendments); *United States v. Sperry Corp.*, 493 U.S. 52 (government action challenged separately under the taking and due process clauses of the Fifth Amendment); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1971) (noting the possibility of a Fourth Amendment challenge in addition to one under the Fourteenth Amendment); *Hudson v. Palmer*, 468 U.S. 517 (1983) (discussing Fourth and Fourteenth Amendment claims); *Ingraham v. Wright*, 430 U.S. 651 (1977) (discussing Eighth and Fourteenth Amendment claims).

Second, *Graham* dealt with a situation where two different constitutional provisions arguably applied to the defendant's action. Here, however, procedural due process may not provide petitioners with a claim because state law did provide some process. *See, Parratt*, 451 U.S. at 544; *Hudson*, 468 U.S. at 535. Under the Seventh Circuit's reasoning, a plaintiff must sue under the constitutional provision that the Seventh Circuit believes comes closest to the plaintiff's claim, even though the claim lacks an essential ingredient that would require its dismissal.

Third, petitioners' claim was not for a denial of procedural due process. Petitioners had an absolute right, as against the whole world, to occupy their lot on September 4, 1987. The very earliest this right could have ended was September 22, 1987, and only then if Terrace Properties could sustain their burden of proving cause for dispossession of the Soldals, a burden they had previously

failed to carry.[11] Their claim was not that the seizure of their home was wrong because the right procedures were not used, their claim was that the seizure was unlawful regardless of the procedures used to effect it. No amount of procedure could legally terminate the Soldals' right to possession prior to September 22. Procedure was irrelevant to their dispossession on September 4; the dispossession itself was wrong.

The potential ramifications of the Seventh Circuit's opinion cannot have been thoroughly considered, and are extremely dangerous. Based upon a hypothetical possibility – the legal dispossession of the Soldals on September 22 after due process and a trial – the Seventh Circuit held that the Soldals had no claim for dispossession on September 4. This same reasoning would justify a police officer's decision to imprison a criminal defendant before trial, even when bail had been set, based on the officer's determination that the defendant would subsequently be found guilty and sentenced to prison; would justify a police officer's seizure of money from a criminal defendant in anticipation of the defendant being found guilty and fined; would authorize a police officer to anticipate a plaintiff's verdict in a personal injury case and seize assets of an insurance company; and would even sanction anticipatory execution of a prisoner on death row, or a death-eligible murder defendant, based on the executioner's belief, perhaps well-founded, that the death

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[11] The assertion in the original panel opinion, J.A. 35 and the suggestion in Judge Easterbrook's *en banc* concurrence, J.A. 70, that petitioners were behind in their rent is incorrect and has no basis in the record.

sentence would ultimately be carried out. The Seventh Circuit clearly would not sanction such results yet all are conceptually identical to the dispossession sanctioned in Soldal. In each case the result – imprisonment, fine, dispossession, death – could eventually happen, separated from the present only by procedural due process. Each could be analyzed as a procedural due process violation – the result was a possibility that could legally occur after process – yet surely each would be seen as violations of specific parts of the Bill of Rights such as the Fourth and Eighth Amendments.

Furthermore, the legal dispossession that the Seventh Circuit anticipated occurring on September 22, 1987 did not happen. The record demonstrates that, when the eviction proceeding came to trial, petitioners won and continued to live at Willoway until December 1987. The Seventh Circuit's presumption that their right to continued possession was doomed did not accord with the actual facts before the court.

The court of appeals' decision would also have the effect of eviscerating any claims for warrantless searches and seizures of persons or things based on probable cause. In such cases, the search or seizure would be legal if the correct process had been used; faced with a sufficient showing of probable cause, a magistrate would have issued a warrant. Yet, this Court has never allowed a Fourth Amendment violation to be excused by such a possibility. *See, e.g., Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Katz v. United States*, 389 U.S. 347, 358 (1967). In such a case, the constitutional violation is not a Fourteenth Amendment procedural due process claim for failure to

pursue legal process to obtain the warrant; rather, it is a direct violation of the Fourth Amendment.

The Seventh Circuit expressed concern that if petitioners were allowed to litigate their claim as a Fourth Amendment seizure "the elaborate jurisprudence of property deprivations under the due process clause that culminates in *Zinermon v. Burch* would turn out to be a point about pleading." 942 F.2d at 1077. This argument misapprehends the different nature of rights under the Fourth and Fourteenth Amendments.

The Fourteenth Amendment right to procedural due process protects against deprivations without constitutionally required pre- or post-deprivation process. *Zinermon v. Burch*, 494 U.S. 113, 127-128. The essence of the action is the denial of process in depriving a person of a constitutionally protected interest, not the deprivation itself. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Indeed, a procedural due process violation is actionable "without regard to whether the same deprivation would have taken place even in the presence of proper procedural safeguards." *Zinermon v. Burch*, 494 U.S at 126 n. 11 (citing *Carey v. Piphus*, 435 U.S. at 266).

A Fourth Amendment violation, on the other hand, involves an unreasonable search or seizure, a determination that is not dependent on, though it may be affected by, the presence or absence of pre- or post-deprivation process. Thus, for example, a warrantless seizure of drugs in plain view is reasonable under the Fourth Amendment without any requirement of process – the obviously incriminating nature of the items makes their seizure reasonable. On the other hand, a seizure may be found

unreasonable even if it is effected after process has occurred. *See, e.g., Malley v. Briggs,* 475 U.S. 335, 345 (1985). Although process will often tend to establish that a seizure was reasonable, *see, e.g., Fuentes v. Shevin,* 407 U.S. 67, 96 n.32 (1972), this will not always be so. In a Fourth Amendment seizure it is the reasonableness of the taking itself, not the procedure, which is at issue.

Fourteenth Amendment procedural due process affects different interests than the Fourth Amendment. It applies to activities such as the provision of utility service, *Memphis Light Gas and Water Division v. Craft,* 436 U.S. 1 (1978), suspension of students from public school, *Goss v. Lopez,* 419 U.S. 565 (1975), forfeiture of a prisoner's good time, *Wolff v. McDonnell,* 418 U.S. 539 (1974), and termination of welfare benefits, *Goldberg v. Kelley,* 397 U.S. 254 (1970), that are unaffected by the Fourth Amendment protection of "houses, papers and effects" against unreasonable searches and seizures. In some cases both the Fourteenth and Fourth Amendments may apply, *see, e.g., Zinermon v. Burch,* 494 U.S. at 126, but there is nothing untoward about different constitutional provisions applying to the same conduct. *See supra,* at 39-40.

Holding that the Fourth Amendment applies to the intentional seizure of the petitioners' "house, papers, and effects" will not undo the *Parratt, Hudson,* and *Zinermon* Fourteenth Amendment jurisprudence. Where no specific violation of the Bill of Rights is involved, those cases will continue to control as to what process the state must provide when it deprives a person of life, liberty or property. Where there is a violation of a specific clause of the Bill of Rights, as there is here, then that violation is

not diminished by the fact that it also possesses some elements of a procedural due process claim.

The Seventh Circuit also expressed concern that allowing the petitioners' claim would swamp the federal courts with "garden-variety commercial disputes." J.A. 56. This concern is not well taken. This was hardly a garden-variety commercial dispute but rather a forcible dispossession by armed officers ready and willing to utilize the "awesome power of arrest and detention." *Moore v. Marketplace,* 754 F.2d 1336, 1346 (7th Cir. 1985). What began as a private dispute ascended to a wholly different level when the sheriff's officers entered the fray on the side of the lawbreakers, Terrace Properties and Margaret Hale. At that point, the acts of the private parties joined with the acts of the sheriffs, and were invested with the power and resources of the state. If the acts were unreasonable, they violated the Fourth Amendment.

This scenario is unlikely to occur on many occasions. Police officers and other state actors will customarily avoid involvement in private civil disputes and will generally seek the protection of a judicial writ prior to seizing non-criminal private property, except where there is an emergency. But if the officers do act unreasonably, and do insert themselves into private disputes, they should be prepared to find themselves liable for constitutional violations. Police officers are, by their station, authority and armed status, imbued with power denied to ordinary citizens. The Constitution commands that the power be exercised responsibly and, in the context of the Fourth Amendment, reasonably. If officers violate that command they should be liable in damages.

A person who has suffered a violation of a specific provision of the Bill of Rights is not barred from vindicating that right through an action under §1983 merely because the violation would appear to some to be a possible procedural due process violation. The Seventh Circuit's holding to the contrary is illogical, unsupported by any authority, and should be rejected.

E. Petitioners were Protected by the Fourth Amendment.

Underlying the Seventh Circuit's refusal to recognize the nature of the violation of the Soldals' rights appears to be a perception that they were entitled to less protection because they were tenants, and because their home was a trailer rather than a traditional fixed structure. J.A. 56-57, 68. This is bad law, and even worse social policy.

A person's status as tenant does not lessen his protection under the Fourth Amendment. *See, e.g., Chapman v. United States,* 365 U.S. 610 (1961). Even an overnight guest can have a legitimate expectation of privacy that the Fourth Amendment will protect. *Minnesota v. Olsen,* 495 U.S. 91 (1990). Although the Soldals' home was a trailer home of the type sometimes misleadingly called "mobile," such homes are "largely immobile as a practical matter. . . . They are generally placed permanently in parks; once in place, only about one in every hundred mobile homes is ever moved." *Yee v. City of Escondido,* ___ U.S. ___; 60 U.S.L.W. 4301 (April 1, 1992). Such homes are a far cry from the completely movable vehicles accorded diminished protection in *California v. Carney,* 471 U.S. 386

(1984), and the fact that the house was not a fixed structure should not limit petitioners' rights under the Fourth Amendment.

Nor does the fact that the Soldals' right to continued possession of their home rested in part on an entitlement under state law diminish the protection of the Fourth Amendment.[12] In many cases, a Fourth Amendment right rests in some respect on state law. For example, this Court has never shrunk from enforcing the Fourth Amendment's prohibition against arrest without probable cause merely because the arrest was for a claimed violation of state law. Yet state laws differ as to what conduct is criminal. In one state where possession of a type of gun is illegal a person can constitutionally be arrested for violation of that law, whereas in a state where possession of such a gun is legal, an arrest for possession would lack probable cause and be unconstitutional. Moreover, "legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois,* 439 U.S. 128, 143-44, n.12; *see also, Board of Regents v. Roth,* 408 U.S. 564 (1972). Thus, the fact that it was, in part, state law which entitled the Soldals to possess, and continue to possess, their home does not diminish but rather enhances their Fourth Amendment protections.

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[12] The Soldals right to possession also rested, in part, on their private contract with Terrace Properties to lease the lot in the park.

In summary, petitioners' possessory and privacy interests protected by the Fourth Amendment were violated when the sheriffs and private parties seized their home and its contents. These interests were not affected any less because petitioners were not suspected of criminal wrongdoing, nor because the seizure occurred in the course of the sheriffs' "civil" rather than "criminal" law enforcement. The decision of the Seventh Circuit holding that the Fourth Amendment does not govern the seizure of petitioners' home, papers, and effects, should be rejected and the case remanded to the district court for trial to determine whether the seizure was reasonable under Fourth Amendment standards.

II. THE SEIZURE, REMOVAL AND VIRTUAL DESTRUCTION OF PETITIONERS' HOUSE VIOLATED THEIR FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHTS

Petitioners alleged and presented proof that the sheriff's officers assisted the Willoway workers in destruction of portions of their trailer home, as well as its removal. Because such destruction violated petitioners' rights to substantive due process, the Seventh Circuit was incorrect in granting summary judgment on this issue as a matter of law.

The Due Process Clause of the Fourteenth Amendment applies to three different types of claims. First, it guarantees fair procedure, *i.e.* that the government will not deprive a person of "life, liberty or property" without

due process of law. Second, it incorporates specific protections of the Bill of Rights, such as the Fourth Amendment claim brought by petitioners here. Third, "the Due Process Clause contains a substantive component that bars certain arbitrary wrongful actions 'regardless of the fairness of the procedures used to implement them.' " *Zinermon v. Burch*, 494 U.S. 113, 125 (1989) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1985)). It was this last protection that petitioners sought to invoke when they alleged that the destruction of their property was a violation of their substantive due process rights. R.1, ¶ 31, 33.

Due process of law is described as a "constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' *Snyder v. Massachusetts*, 291 U.S. 97 (1933), or are 'implicit in the concept of ordered liberty' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)." *Rochin v. California*, 342 U.S. 165, 169 (1951). Substantive due process protects against government action that "shocks the conscience," *id.* at 172, and "serves to prevent governmental power from being 'used for purposes of oppression.' " *Daniels v. Williams*, 474 U.S. 327, 331 (1985), (quoting *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 277 (1956)).

The complaint alleged that respondents engaged in "wanton destruction," inflicted as part of an "effort to intentionally damage the Soldals' trailer." J.A. 47 (Judge Flaum, dissenting). The facts as testified to by Mr. Soldal showed a level of destruction greatly in excess of anything that could be justified by a mere eviction. This was clearly conduct that was designed to intentionally hurt

petitioners and was not a necessary adjunct to an eviction. In addition, this destruction should not be viewed outside its context of a wholly illegal dispossession that was known to be illegal by the sheriffs at the scene. Moreover, this was not merely destruction of property; it was destruction of petitioners' home, a type of destruction likely to have immense repercussions on petitioners' ability to live their lives free from unwanted intrusion, and which would deeply affect their mental tranquility. The sheriff's aid to the destruction could be rationally seen as a use of power for the purpose of oppression that violated respect for petitioners' fundamental right to their home and shocked the conscience. Thus, a properly instructed jury could reasonably have entered judgment in favor of petitioners on their substantive due process claim. Summary judgment in favor of respondents was therefore in error and should be reversed.

CONCLUSION

The decision of the Seventh Circuit Court of Appeals should be reversed and the case remanded to the district court for a trial on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD SOLDAL, ET AL.,

Petitioners,

vs.

COUNTY OF COOK, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1) Does the presence of a police officer at the scene of a private eviction constitute state action.

2) Are the protections of the Fourth Amendment inapplicable where there is no search for and no taking of property which could be used as evidence and no interference with any expectation of privacy.

3) Does the action of illegally evicting petitioners from their leased mobile home lot constitute a violation of petitioners' constitutional right to due process of law.

4) Are petitioners entitled to 42 U.S.C. § 1983 redress for a landlord/tenant dispute which resulted in petitioners' illegal eviction and incidental property damage.

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IN THE

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OCTOBER TERM, 1991

EDWARD SOLDAL, ET AL.,

Petitioners,

VS.

COUNTY OF COOK, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

Certiorari was granted to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Soldal v. County of Cook*, 923 F.2d 1241 (7th Cir. 1991), modified, *en banc*, in *Soldal v. County of Cook*, 942 F.2d 1073 (1991). The opinion of the United States District Court for the Northern District of Illinois is unreported. Copies of these opinions may be found within the parties' joint appendix at pages 3-89.

STATEMENT OF THE CASE

The instant action arose out of a landlord/tenant dispute between petitioners, Edward (hereinafter, Soldal) Mary, Jimmy, Alena, Joseph and Jessie and Willoway Terrace (Willoway), a mobile home park owned by Terrace Properties, one of the respondents herein. (Complaint, par. 2) On September 4, 1987, two Willoway workers, acting without a court order and in contravention of the Illinois Forcible Entry and Detainer Act (Ill. Rev. Stat. 1987, ch. 110, par. 9-101 *et seq.*) towed petitioners' mobile home off the park premises. At the behest of respondent Cook County Sheriff's Officer Lieutenant Jones, Willoway temporarily stored petitioners' mobile home at a construction company located next door to the park. (R. 56, Attachment C) Respondent Cook County Deputy Sheriff Shawn O'Neill was present merely to keep the peace during the eviction. (R. 56, Attachment C) Five days later, on September 9, 1987, the Circuit Court of Cook County ordered petitioners' mobile home returned to Willoway. (Complaint, par. 19)

During the eviction and the subsequent towing, petitioners' mobile home incurred incidental property damage: torn skirting, damaged external sewer and water boxes and damaged internal household items. (Complaint, pars. 11, 15) One year later, petitioners brought a 42 U.S.C. § 1983 cause of action in the District Court for the Northern District of Illinois, Eastern Division, seeking redress from respondents for the property damage incurred during the illegal eviction. Respondents are *inter alia*, Terrace Properties, Inc., Margaret Hale, Willoway's manager, and several lower echelon officers of the Cook County Sheriff's Office, in their individual capacities (collectively, respondents). (Complaint, pars. 4, 6)

Count I of petitioners' complaint, which is at issue in the instant action, alleged that respondents "conspired together to violate [petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution] * * * by unlawfully evicting [petitioners], removing them from the trailer park, and destroying their property." (Complaint, pars. 31, 33) The District Court granted respondents' motion for summary judgment, finding that petitioners failed to establish the requisite state action to sustain a § 1983 cause of action. (J.A. 19-21)

Petitioners appealed the District Court's judgment to the United States Court of Appeals for the Seventh Circuit. A majority of the Court of Appeals affirmed the lower court's grant of summary judgment in favor of respondents. (J.A. 45) However, to reach the merits of petitioners' constitutional claims, the Court of Appeals "assumed" that petitioners had established the existence of a conspiracy amongst respondents. (J.A. 38) The Court of Appeals found that petitioners' Fourth Amendment and Due Process rights were not violated by respondents' actions. (J.A. 40-41, 42, 66)

Petitioners now appeal the Court of Appeals' judgment to this Court. Given the summary judgment posture of this cause, the following facts are taken in a light most favorable to petitioners. Prior to the eviction at issue here, on August 21, 1987, Willoway filed suit against petitioners in the Circuit Court of Cook County, Illinois. Pursuant to the Illinois Forcible Entry and Detainer Act, Willoway sought possession of the lot upon which petitioners' mobile home was located. The cause was set for hearing on September 22, 1987. (Complaint, par. 10) However, on September 4, 1987, Willoway decided to evict petitioners without a court order. Without informing the Cook County Sheriff's Office of their intention to evict petitioners with-

out a court order, Willoway management requested the presence of a deputy sheriff to maintain the peace during the eviction. (R. 56, Attachment C) Therefore, Captain Jackson dispatched Deputy Sheriff O'Neill to Willoway, instructing him to "stand by to maintain peace." (R. 56, Attachment C)

At approximately 1:00 p.m., two workers for Willoway arrived at the lot upon which petitioners' mobile home rested and began preparing the mobile home for removal. (R. 56, Attachment E, pp. 12-14) Deputy Sheriff O'Neill arrived at the lot at approximately the same time and remained in his squad car without speaking to the Willoway workers. (R. 56, Attachment E, p. 15) Petitioner Soldal left his mobile home and asked the workers what they were doing. They responded, "[A]sk the sheriff deputy." (R. 56, Attachment E, p. 16) Soldal then asked Deputy Sheriff O'Neill "[w]hat [he was] going to do about this?" O'Neill responded that "he was there to see that [Soldal] didn't interfere with Willoway's workers" and that he was "just doing what the chief told him." (R. 56, Attachment E, pp. 17-18) After a series of telephone calls with his attorney, Soldal telephoned either Chief Wittsman or Captain Levy of the Cook County Sheriff's Office. One of these men indicated that he was unaware of any deputy sheriff being dispatched to Willoway. (R. 56, Attachment E, pp. 24-25)

Lieutenant Jones arrived at the office of the park management at approximately 1:30 p.m. Ms. Hale informed Lieutenant Jones that Willoway was acting pursuant to a court order. However, since Ms. Hale was unable to produce an eviction order, Lieutenant Jones contacted Captain Jackson to determine the status of the eviction proceedings. Captain Jackson informed Lieutenant Jones that the eviction proceedings were still pending. Lieutenant Jones then realized that Willoway was not proceeding pursuant to a court order. (R. 56, Attachment C)

At this time, petitioner Soldal stated to Lieutenant Jones that he wanted to file a complaint against Willoway for criminal trespass to property. (R. 56, Attachments C and E, pp. 43-44) Lieutenant Jones then spoke with Assistant State's Attorney Dana Crowley. She advised Lieutenant Jones that the elements of criminal trespass were not present because possession was disputed between the parties. (R. 56, Attachment C) Jones informed Soldal that the "D.A. * * * said [he] couldn't file any complaint, that it was between the landlord and tenant. . . ." (R. 56, Attachment E, p. 46)

Simultaneously, the two Willoway workers were proceeding with the eviction, which resulted in the property damage at issue here. Respondent Sergeant James Hunt, of the Cook County Sheriff's Office, then escorted petitioners to a nearby motel, where Willoway had arranged four nights' paid accommodations. (R. 56, Attachment C)

SUMMARY OF ARGUMENT

This action arose out of a landlord/tenant dispute between private parties, which resulted in an illegal eviction with incidental property damage. Petitioners attempt to capitalize upon the mere presence of lower echelon officers of the Cook County Sheriff's Office during the eviction to convert their claim into a federal civil rights cause under 42 U.S.C. § 1983. Under the guise of § 1983, petitioners seek federal redress for what is essentially a state court action for damages.

To accomplish this, petitioners invoke the Fourth Amendment of the United States Constitution, alleging that towing their mobile home constituted a Fourth Amendment seizure. However, the Fourth Amendment is inapplicable to the instant cause. The origins of the Fourth Amendment establish that the evil at which the Amendment is directed is a governmental search or seizure which invades a person's privacy and which seeks to produce evidence capable of being used against that person. In keeping with those origins, decisions of this Court have consistently held that the Amendment protects privacy rights and is not applicable where property rights alone are involved. Not all aspects of privacy, however, are subject to Fourth Amendment protection. There exists a general right to privacy, the right to be let alone in solitude. This general right to privacy, in different contexts, is entitled to protection from various sources, mainly the property laws of the individual states. The Fourth Amendment, however, does not protect this privacy interest. Only where an intrusion on solitude includes a search or seizure for the potential disclosure of information are there any Fourth Amendment implications.

The respondents' relocation of the petitioners' mobile home intruded upon no privacy interest subject to Fourth Amendment protection. There was no gathering or attempt to gather information for any purpose. The respondents learned nothing which the petitioners reasonably expected to remain private. The facts which the petitioners have pleaded invoke only the concerns of local property law. To the extent, then, that the complaint alleged a Fourth Amendment violation, it was properly dismissed.

Similarly, petitioners seek redress through the substantive component of the Due Process Clause for the property damage incurred during the eviction. Substantive due

process does not apply under the facts of this case. Essentially, petitioners seek to protect their right to be free from an illegal eviction and incidental property damage. This interest does not rise to the level of fundamental interests to which this Court has extended substantive due process protection. Rather, procedural due process is applicable under the instant set of facts.

Here, to the extent that the actions of the private parties are attributable to the respondent deputy sheriffs, the behavior of these lower echelon officials is "random and unauthorized." The Cook County Sheriff's Office personnel were not acting pursuant to State procedure. Rather than effectuating State policy, their conduct was an aberration. The Court of Appeals properly recognized that *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) and its progeny govern the instant action. (J.A. 38-41)

Petitioners have "adequate state remedies" for the property damage they incurred during the illegal eviction. They are entitled to post-deprivation redress through the State of Illinois' tort claims mechanism. Therefore, Illinois has provided petitioners with all the process they are due. Under these facts, petitioners' right to procedural due process has not been violated.

Through § 1983, petitioners seek to convert a garden variety state tort claim for property damage into a federal constitutional cause of action. Petitioners advocate interpreting § 1983 and the constitutional Amendments at issue here in a manner that is completely devoid of the notion of federalism. Petitioners attempt to "federalize" the law of torts, thereby usurping a body of law that is properly relegated to the States.

ARGUMENT

I.

THE ILLEGAL ACTS OF A PRIVATE PARTY DO NOT CONSTITUTE "STATE ACTION", WHERE A POLICE OFFICER WAS MERELY PRESENT AT THE SCENE OF THE EVICTION.

In this case, Willoway Terrace, the owner of the mobile home park, decided to remove the petitioners' mobile home from its pad. Summoned by an agent of Willoway, Cook County Sheriff's police officers came to Willoway to maintain the peace during the eviction.

Respondents submit that any illegal actions by the private party, Willoway, should not be ascribed to the government merely because a governmental police officer was present to maintain the peace. If this were true, hundreds of differences of opinion between private citizens would be transformed into "state action", merely because a police officer arrives to mediate the problem, or to maintain the peace. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 32 L.Ed.2d 627, 92 S.Ct. 1965 (1972).

In *Moose Lodge*, this Court held that "the decision to discriminate could not be ascribed to any government decision;" here, similarly, the decision to pull the mobile home from its resting place cannot be ascribed to any government decision. To be "under color of" state law within § 1983, respondents urge that there be at least some significant action by a state or subdivision. "Careful adherence to the 'state action' requirement . . . avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982).

This Court, in *Lugar*, enunciated a two pronged test to establish the existence of "state action":

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. *Lugar*, 457 U.S. at 937.

Under the circumstances of this case, the only way there can be the requisite state action is if there were a conspiracy between the public and private parties. The private parties actually relocated petitioners' mobile home, not the governmental officers. The necessity of establishing a conspiracy was recognized by the District Court. (R. 69, pp. 11, 12) Petitioners also recognized the need for a conspiracy. "At all times material . . . all the deputy sheriff defendants . . . were acting jointly and/or in conspiracy with these [civilian] defendants. . . ." (Complaint, par. 7) In Count I of their complaint, petitioners alleged "[Respondents] . . . reached an understanding, engaged in a sequence of events or joint course of conduct and/or otherwise agreed and conspired together. . ." (Complaint, par. 31) "These conspirac(ies)/joint action(s) was/were effected under color of law. . . ." (Complaint, par. 32)

It was the lack of evidence of a conspiracy that led the District Court to grant the governmental respondents' motion for summary judgment. (R. 69, p. 19) Implicit in that finding is that the actions of the deputy sheriffs did not rise to the level of state action, or the "significant aid" portion of the second prong of the *Lugar* test.

In contrast, the Court of Appeals, in the panel opinion, concluded that there was evidence of a conspiracy. The court stated:

> [Mr. Soldal] was certainly entitled to call on the police to obviate the need for self-help by preventing what undoubtedly was a criminal trespass to his property, since the trespassers were not acting under even a colorable entitlement. . . . The police prevented Soldal from exercising his statutory right to defend his property. That is state action. (J.A. 37)

In the *en banc* opinion, the Court of Appeals reiterated that the deputy sheriffs "prevented" petitioner Soldal from exercising his right to self-help, but stated that that might not have made the police actual participants. (J.A. 54) The *en banc* opinion then "assumes" a conspiracy.[1]

Officer O'Neill is the vehicle that the appellate court apparently used to find state action. Presumably, it was the alleged words he spoke to Soldal that the Court used

[1] Petitioners sued seven members of the Sheriff's Office, in their *individual* capacities. The evidence against Chief Wittsman and Captain Levy is that Soldal talked to *one* of these two men, who was simply unaware that a Cook County deputy sheriff had been dispatched to Willoway. Captain Jackson assigned Officer O'Neill to standby and maintain peace during the eviction. Rather than "conspiring" with Ms. Hale, Lieutenant Jones was merely attempting to determine whether Willoway had a court order to proceed with the eviction. Lieutenant Jones attempted to facilitate petitioner Soldal in filing a criminal complaint against Willoway. However, after discussing the case with the prosecutor's office, Lieutenant Jones determined that Willoway had not engaged in criminal behavior. Sergeant Hunt was present and led the Soldals to the motel after the eviction. There was no evidence offered by petitioners against either Officers Haritos or Vaid to suggest that they were even present at the scene. Those are the seven defendants. Only one of them spoke to the trailer park manager. There simply was no evidence that they conspired with each other or the private party respondents to deprive petitioners of their constitutional rights.

to conclude that Soldal was prevented from engaging in self-help. Yet, in an individual capacity lawsuit, one cannot be held accountable for the acts of another but only for one's own actions. *Rizzo v. Goode*, 423 U.S. 362, 371, 46 L.Ed.2d 561, 569, 96 S.Ct. 598, 605 (1976). Assuming, *arguendo*, that the words of Officer O'Neill created state action, the named respondents cannot, under existing case law, be saddled with that same conclusion. Only what each respondent did *personally* can be used against him to determine if, in each individual case, there was state action. It is abundantly clear that the actions of the police officer respondents do not come remotely close to the state action requirement. Without state action, a federal court does not have jurisdiction.

Petitioners have failed to establish a conspiracy between the private party respondents and the public respondents. Necessarily, viable § 1983 claims against both the private and public respondents require the existence of a conspiracy. Petitioners have failed to establish such a conspiracy. Therefore, their cause of action must fail.[2]

[2] The police officer respondents are being sued in their individual capacities. They are, therefore, entitled to qualified immunity. *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967). Because of the summary judgment posture of this cause, the issue of qualified immunity was never addressed. Assuming this Court determines that one or more of the named respondents' conduct constituted state action and that the Fourth Amendment applies, then those defendants are entitled to qualified immunity. In *Procunier v. Navarette*, 434 U.S. 555, 55 L.Ed.2d 24, 98 S.Ct. 855 (1978), this Court held that public employees were entitled to immunity unless they knew or reasonably should have known that their actions violated a person's constitutional rights. At the time of this occurrence, the applicability of the Fourth Amendment to these facts was not clearly established. In *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1971), this Court declined to decide the applicability of the Fourth Amendment. As the Court

(Footnote continued on following page)

II.

THE FOURTH AMENDMENT IS NOT IMPLICATED BY THE CONDUCT IN THIS CASE SINCE THERE WAS NO SEARCH FOR, OR SEIZURE OF, EVIDENCE WHICH COULD BE USED AGAINST PETITIONERS OR WHICH VIOLATED PETITIONERS' FOURTH AMENDMENT PRIVACY RIGHTS.

The petitioners contend that the conduct of the respondents violated the Fourth Amendment of the United States Constitution. In particular they contend that the relocation of their mobile home and its contents was "governed by" the Fourth Amendment because "the Fourth Amendment applies to all seizures whether or not they occur in the context of a criminal case." (Pet. Br. 15) The petitioners argue further that the respondents' conduct violated petitioners' Fourth Amendment possessory rights in their property and petitioners' privacy rights "to be let alone" from governmental intrusion.

The origins and development of Fourth Amendment principles call for the rejection of petitioners' arguments. The Fourth Amendment protects a person from searches and seizures aimed at obtaining evidence against that person. It protects a person's privacy, the right to be free from governmental prying to obtain evidence which might be used in some fashion against that person. An interference which affects only property interests, without an accompanying search for evidence or gathering of information, is not the subject of Fourth Amendment protection.

[2] *continued*
of Appeals noted in its *en banc* opinion, this is a question of "surprising novelty" for which there is no clear exposition of authority. (J.A. 55) Given the unsettled history, this is the classic instance where qualified immunity applies.

Here, there was a relocation of petitioners' mobile home, an interference with property rights, but not a seizure for purposes of the Fourth Amendment. The mobile home was returned to its owners. It was neither taken nor held for evidentiary purposes. There was no search, no prying within the mobile home, and no gathering of information concerning the petitioners. For these reasons, the petitioners' claim of a Fourth Amendment violation is without merit.

A.

THE FOURTH AMENDMENT IS NOT IMPLICATED BY THE RELOCATION OF THE PETITIONERS' MOBILE HOME SINCE THERE WAS NO SEARCH AND NO HOLDING OF EVIDENCE WHICH COULD BE USED AGAINST PETITIONERS.

The Fourth Amendment to our Constitution was a direct response to the unpopular searches and seizures which had previously arisen under General Warrants in England and Writs of Assistance in the Colonies. The famous English trials of *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763) and *Entick v. Carrington*, 19 St. Tr. 1029 (1765), describe the Secretary of State's practice of issuing, without probable cause, general warrants authorizing the search of a citizen's home and seizure of his personal papers for examination by the Secretary. In similar fashion in the Colonies, Writs of Assistance authorized general searches and seizures to discover smugglers and confiscate their goods. Frankael, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 364 (1920). Writing in *Entick v. Carrington*, 19 St. Tr. at 1073, Lord Camden linked the evil inherent in unreasonable searches to that of compelled self accusation:

> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of com-

> pelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.

Commenting on the origins of the Fourth Amendment over a century later, the Court in *Boyd v. United States*, 116 U.S. 616, 630, 29 L.Ed. 746, 751, 6 S.Ct. 524, 534 (1885), similarly likened that Amendment to what had become the Fifth Amendment privilege against self-incrimination. At issue in *Boyd* was the propriety of a court order that the petitioner produce an invoice for twenty-nine cases of plate glass which were the subject of a forfeiture for a violation of customs laws. Treating the order as an attempt to seize the papers contrary to the Fourth Amendment and viewing the case as quasi-criminal in nature, the Court again drew a parallel between the Fourth and Fifth Amendments:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. 116 U.S. at 630.

That the Fourth Amendment was directed against searches for, and seizures of, evidence to be used against a citizen was reiterated in *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 48 L.Ed. 860, 24 S.Ct. 563 (1903). In *Baird*, the respondent argued that a statute requiring production of certain contracts violated his Fourth Amendment rights against unreasonable search and seizure. *Id.* at 35. With reliance on *Boyd*'s analogy between the Fourth and Fifth Amendments, the Court dismissed

the argument because, by statute, the respondent was immunized from any prosecution which might be based on the documents produced. *Id.* at 46. Since the items to be seized could not be used against the respondent, there were no Fourth Amendment implications.

The analogy drawn in all of these earlier cases between the Fourth and Fifth Amendments makes it clear that the core of the Fourth Amendment pertains to the search and seizure of evidence to be used against people. The concern in *Entick v. Carrington*, 19 St. Tr. at 1074, for example, was whether "a right of search for the sake of discovering evidence ought in any case to be allowed. . . ."

Later cases which discussed the origins of the Fourth Amendment moved away from a comparison of that Amendment to the privilege against self-incrimination. Each of them, however, continued to place the roots of the Fourth Amendment in the colonists' reaction to the pre-revolutionary use of general warrants to invade the homes and privacy of persons in search of evidence. The case of *Weeks v. United States*, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914), concerned a warrantless search of a home to support a charge of illegal transportation of lottery tickets. This Court traced the origin of the Fourth Amendment to the earlier reaction against general warrants and the abuse of governmental authority to search and to seize citizens' private papers "in support of charges, real or imaginary, made against them." *Id.* at 390.

The Court in *Frank v. Maryland*, 359 U.S. 360, 365, 3 L.Ed.2d 877, 882, 79 S.Ct. 804, 808 (1959), noted the earlier comparisons of the Fourth and Fifth Amendments, but found that question irrelevant in determining what is protected by the Fourth Amendment:

> Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and

> Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.

The Court in *Frank* went on to hold that there were no Fourth Amendment implications in a housing inspector's attempted warrantless inspection of a home since, "[n]o evidence for criminal prosecution is sought to be seized." 359 U.S. at 366.

The later opinion in *Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967), expressed no quarrel with the analysis of the Fourth Amendment's purpose in *Frank*, but only with the limitation of the Amendment's protection to cases involving criminal prosecution. The *Camara* opinion refers repeatedly to the activity of the housing inspector as an "inspection," a "search," or an "administrative search." Whatever the terminology, the Court's concern was that the inspector was conducting a warrantless search for information. Whether the fruits of the search were to further prosecution of the criminal laws or to enforce the building codes, the Court found immaterial. What is material for Fourth Amendment purposes is that the inspector looks for information to be used as evidence and that the "inspections of the kind we are here considering do in fact jeopardize 'self-protection' interests of the property owner." 387 U.S. at 531. As a result, the Court held that a housing inspection required either consent, exigent circumstances, or a warrant.

What is apparent in the origins of the Fourth Amendment, and not contradicted by any of its later development, is that the Amendment is not applicable to every governmental trespass or taking of property. The drafters of the Article directed it to a very specific problem, government's invasion for the purpose of obtaining evidence to be used in some fashion against its citizens. This offers the only explanation for the Court's conclusion that the Amendment "has no reference to civil proceedings for recovery of debts, of which a search warrant is not made part." *Den v. The Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 285, 15 L.Ed. 372 (1856).

That the Fourth Amendment has no application to the facts of this case is apparent in Justice Learned Hand's statement of the purpose of the Amendment:

> [I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930).

In this case, there was no securing of evidence against the petitioners. There was no rummaging about among their effects and no search. The respondents seized nothing to be used against the petitioners. As a result of their actions, respondents learned nothing about the petitioners which they did not know before. For these reasons, there was no violation of petitioners' Fourth Amendment rights and the decisions to deny relief upon petitioners' complaint should be affirmed.

B.

THE FOURTH AMENDMENT IS NOT IMPLICATED BY THE RELOCATION OF THE PETITIONERS' MOBILE HOME SINCE THERE WAS NO INTRUSION ON THE PETITIONERS' EXPECTATION OF PRIVACY WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The "invasion of a man's privacy," noted in the above quote from Judge Learned Hand, has become the touchstone of all modern analysis of the Fourth Amendment.

Oliver v. United States, 466 U.S. 170, 177, 80 L.Ed.2d 214, 223, 104 S.Ct. 1735, 1740-41 (1984). Nowhere is this more apparent than in the differences between two major eavesdropping cases of this century. In *Olmstead v. United States*, 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 (1927), government agents obtained evidence by tapping the telephone lines of the defendants' homes and offices. The court found no Fourth Amendment violation because there was no physical entry of the premises. 277 U.S. at 464.

Forty years later, the Court overruled *Olmstead* in a case where agents electronically monitored the defendant's conversation in a phone booth. *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967). In so doing the Court refused to characterize the issue in terms of whether the telephone booth was a "constitutionally protected area." Quoting *Warden v. Hayden*, 387 U.S. 294, 304, 18 L.Ed.2d 782, 790, 87 S.Ct. 1642, 1648 (1967), the Court announced that the "premise that property interests control the right of the Government to search and seize has been discredited." *Katz*, 389 U.S. at 352. The Court then rephrased the issue, not in terms of property interests, but privacy interests, i.e., whether the Government's act of listening to the petitioner's words "violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353.

In *Warden v. Hayden*, 387 U.S. 294, 18 L.Ed.2d 782, 87 S.Ct. 1642 (1967), the Court had at length reviewed the earlier notion that Fourth Amendment analysis involved a balancing of competing property interests in the place searched or the item seized. After looking at the history and development of the Amendment, the Court

rejected the property rights analysis and concluded that the Fourth Amendment protects privacy rather than property. "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." 387 U.S. at 304.

After *Katz* and *Hayden*, the fact that the Fourth Amendment protects privacy was again noted in *Wyman v. James*, 400 U.S. 309, 27 L.Ed.2d 408, 91 S.Ct. 381 (1971), which considered the constitutionality of a statute allowing for termination of welfare benefits to a recipient who refused a home visit by a caseworker. The Court first noted that it "consistently has been most protective of the privacy of the dwelling." 400 U.S. at 316. The Court, though, upheld the statute, in part because the protection of privacy was not a factor "for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term." 400 U.S. at 317. The entry into the home did not in itself invoke the Fourth Amendment since, with no significant investigative purpose, it involved no violation of privacy rights.

In *Cardwell v. Lewis*, 417 U.S. 583, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974), where the police took paint scrapings from the exterior of the defendant's impounded automobile, a plurality of the Court rejected the defendant's Fourth Amendment challenge. "Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy." 417 U.S. at 589. Without an intrusion into the car's interior, no expectation of privacy was impinged. 417 U.S. at 591.

That the Fourth Amendment protects privacy interests rather than property interests remains at the core of this

Court's decisions. "The central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *South Dakota v. Opperman*, 428 U.S. 364, 377, 49 L.Ed.2d 1000, 1009-10, 96 S.Ct. 3092, 3101 (1976) (Powell, J., concurring). The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7, 53 L.Ed. 538, 546, 97 S.Ct. 2476, 2481 (1977). "The Fourth Amendment protects legitimate expectations of privacy rather than simply places." *Illinois v. Andreas*, 463 U.S. 765, 771, 77 L.Ed.2d 1003, 1010, 103 S.Ct. 3319, 3324 (1983).

It is the Fourth Amendment's protection of privacy, rather than property rights, that is at the heart of this Court's opinions involving the seizure of items in plain view. Since the Fourth Amendment offers no protection for what a person knowingly displays to the public, *United States v. Dionisio*, 410 U.S. 1, 14, 35 L.Ed.2d 67, 79, 93 S.Ct. 764, 771 (1973), a seizure of property in plain view is not an invasion of privacy, is presumptively reasonable, and is not in itself a violation of the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 587, 63 L.Ed.2d 639, 651, 100 S.Ct. 1371, 1380 (1980). The plurality opinion in *Texas v. Brown*, 460 U.S. 730, 739, 75 L.Ed.2d 502, 511, 103 S.Ct. 1535, 1541 (1983), stated that the principle supporting the plain-view doctrine is the "recognition that when a police officer has observed an object in 'plain-view,' the owner's remaining interests in the object are merely those of possession and ownership. . . ." The majority opinion in *Illinois v. Andreas*, 463 U.S. 765, 771, 77 L.Ed.2d 1003, 1010, 103 S.Ct. 3319, 3324 (1983), presents the principle even more clearly: "The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its

owner's privacy interest in that item is lost; the owner may retain the incidents of the title and possession but not privacy."

The petitioners' argument that the Fourth Amendment protects possessory rights, if understood to mean that there can be a Fourth Amendment violation where no privacy right is involved, is simply contrary to this Court's decisions. A seizure of property, of course, involves by definition "some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L.Ed.2d 85, 94, 104 S.Ct. 1652, 1656 (1984). However, no case holds that an interference with that possessory interest in itself violates the Fourth Amendment. The police seized the paint scrapings in *Cardwell v. Lewis*, 417 U.S. 583, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974), thus intruding on a possessory interest, but committed no Fourth Amendment violation since no expectation of privacy was impinged. 417 U.S. at 591. The officer in *Texas v. Brown*, 460 U.S. 730, 75 L.Ed.2d 502, 103 S.Ct. 1535 (1983) seized the defendant's balloon without a Fourth Amendment violation because the owner had a possessory interest but no privacy interest.

The basis of the Court's holding in *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984), was Palmer's lack of privacy rights. The Court phrased the issue before it as "whether a prison inmate has a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches and seizures." 468 U.S. at 519. Later, the Court stated the seminal principle of Fourth Amendment protection: "The applicability of the Fourth Amendment turns on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by govern-

ment action." 468 U.S. at 525 (quoting *Smith v. Maryland*, 442 U.S. 735, 740, 61 L.Ed.2d 220, 226, 99 S.Ct. 2577, 2580 (1979)). In *United States v. Karo*, 468 U.S. 705, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984), discussing the significance of possessory interests in the context of a seizure, the Court said: "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." 468 U.S. at 712-713. A purely possessory interest may be relevant in determining the existence of an expectation of privacy, but that interest in itself is insufficient to warrant Fourth Amendment protection. *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978).

The petitioners' reliance on *United States v. Place*, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983), ignores the entire context of the seizure in the case and the fashion in which the Court phrased the issue. Involved in *Place* was not simply a detention of a piece of luggage, but, as the Court repeatedly called it, an "investigative detention" of the property. The luggage was detained so that government agents could determine its contents. Hence, the Court set out the issue as "whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics." 462 U.S. at 697-698. Underlying the entire analysis was the fact that the purpose of the seizure was to learn the contents of the luggage. From that starting point, the Court went on to determine whether the seizure was reasonable. In so doing, the Court noted, in reliance on *United States v. Chadwick*, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977), that the purpose of the Fourth Amendment is to protect

against intrusions on legitimate expectations of privacy and that a person has a privacy interest in the contents of personal luggage. *Place*, 462 U.S. at 706-707. Taken in its context, therefore, the *Place* opinion supports the premise that the object of the Fourth Amendment is the protection of privacy. *Cardwell v. Lewis*, 417 U.S. at 589.

C.

THE FOURTH AMENDMENT IS NOT IMPLICATED BY THE RELOCATION OF THE PETITIONERS' MOBILE HOME SINCE THE PETITIONERS' GENERAL RIGHT TO PRIVACY, THE RIGHT TO BE LET ALONE, IS NOT IN ITSELF THE SUBJECT OF FOURTH AMENDMENT PROTECTION.

Since the Fourth Amendment protects against unreasonable intrusions upon legitimate expectations of privacy, the validity of the petitioners' Fourth Amendment claim requires the violation of a privacy right. The petitioners claim the right violated was their right of seclusion or solitude, the right to be let alone. (Pet. Br. p. 34) The opinions of this Court, however, indicate that there is no "right of seclusion" protected by the privacy concerns of the Fourth Amendment.

The petitioners are correct to point out the distinction which Judge Posner has made between the two interests embraced in the word "privacy." Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 51, n. 7 (1981). Privacy includes the concept of solitude or seclusion, the right to be left alone without interruption. On the other hand, privacy involves the idea of secrecy, concealment of information from others. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 174 (1979). If the petitioners' privacy was violated in this case, such a violation pertains, as petitioners

contend, to an encroachment on their seclusion or solitude. Petitioners do not, and cannot, maintain that the respondents in any way pried into matters intended to be kept secret.

Privacy in the sense of solitude, that "right to be left alone" from the intrusion of others, however, is not a right protected by the Fourth Amendment. Neither Judge Posner nor this Court has ever maintained that the Fourth Amendment extends to such a right. Judge Posner's writings are consistent with the opinion he rendered below in this case. While the Judge acknowledged the concept of privacy as seclusion, he made it clear that the Constitution establishes no general right to be left alone. "There is no suggestion of such a right in the Constitution. There are simply particular rights to be free from specific forms of invasion of privacy." Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. at 181.

More importantly, this Court has consistently recognized that what has been called the right to be left alone is not cognizable under the Fourth Amendment. In *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), the Court acknowledged a "right to be let alone by other people," which it called a "*general* right to privacy." 389 U.S. at 350. But that right, the Court said, is not the subject of the Fourth Amendment. "[T]he Fourth Amendment cannot be translated into a general constitutional right to privacy." 389 U.S. at 350. On the contrary, "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." 389 U.S. at 350-351. (Emphasis in original).

That "general" right to privacy, the right to be left alone referred to in *Katz*, is given protection from a number of sources depending on the context of the intrusion. *Katz* left the protection mainly to state law. The same view is present in *Oliver v. United States*, 466 U.S. 170, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984): "The law of trespass recognizes the interest in possession and control of one's property and for that reason permits exclusion of unwanted intruders." 466 U.S. at 183, n.15. Protection in some particular cases can arise from the Constitution. *Katz*, for example, noted protection at times in the Freedom of Association Clause of the First Amendment, the Third Amendment's prohibition against quartering of soldiers in time of peace, and the Fifth Amendment. 389 U.S. at 350, n.5. In other contexts, the Court has seen protection in the Due Process Clause of the Fifth and Fourteenth Amendments. *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972).

In this case, the right to exclude others, for which petitioners claim Fourth Amendment protection, is, as the majority below concluded, actually a property right. Cases discussing the right in the context of the Takings Clause of the Fifth Amendment certainly considered it as such. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82, 64 L.Ed.2d 741, 752, 100 S.Ct. 2035, 2041 (1980), the Court observed that "one of the essential sticks in the bundle of property rights is the right to exclude others." Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), the Court treated the power to exclude others as a property right and concluded that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." 458 U.S. at 436.

The current petitioners were disturbed in the possession of their property. To the extent that their solitude

has been infringed, they certainly have a remedy, but not one that flows from the Fourth Amendment. "It is privacy that is protected by the Fourth Amendment, not solitude." *O'Connor v. Ortega*, 480 U.S. 709, 730, 94 L.Ed.2d 714, 731, 107 S.Ct. 1492, 1504 (1987) (Scalia, J., concurring).

III.

THE ACTION OF ILLEGALLY EVICTING PETITIONERS FROM A LEASED MOBILE HOME LOT DID NOT AMOUNT TO A VIOLATION OF PETITIONERS' DUE PROCESS RIGHTS.

The instant action originated in a landlord/tenant dispute over a leased lot upon which petitioners' mobile home rested. Respondents, without properly invoking the procedural mechanisms of the Illinois Forcible Entry and Detainer Act, simply removed petitioners' mobile home from their property. In accomplishing the eviction, respondents removed the skirting from petitioners' mobile home, disconnected the mobile home from the utilities that were servicing it, unmoored the mobile home, and towed it from the lot. (Complaint, pars. 11, 31) The mobile home was subsequently returned to petitioners.

Petitioners brought this 42 U.S.C. § 1983 action, alleging in the complaint that respondents, *inter alia*, violated their rights under the Fourteenth Amendment to the United States Constitution to substantive and procedural due process by "unlawfully evicting [petitioners] and destroying and damaging their property." (Complaint, Ct. I, par. 33) However, before this Honorable Court and the Court of Appeals, petitioners disavow any claim to § 1983 relief based upon a denial of *procedural* due process. (J.A. 39; Pet. Br. 39-40) Respondents contend that the illegal eviction here, though subject to a State damage action, was not a violation of petitioners' due process rights.

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property without due process of law." This Court has construed the Due Process Clause to afford three different kinds of constitutional protection. Although not at issue here, Due Process incorporates the specific protections defined in the Bill of Rights. *Daniels v. Williams*, 474 U.S. 327, 337, 88 L.Ed.2d 662, 672, 106 S.Ct 662, 677 (1986) (Stevens, J., concurring in judgments). The second and most common guarantee associated with Due Process is the guarantee that the government will not deprive an individual of life, liberty or property without providing appropriate procedural safeguards. *United States v. Salerno*, 481 U.S. 739, 746, 95 L.Ed.2d 697, 708, 107 S.Ct. 2095, 2101 (1987). Petitioners, however, attempt to invoke the third guarantee, the substantive component of the Due Process Clause, which bars certain arbitrary, wrongful government action "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125, 108 L.Ed.2d 100, 113, 110 S.Ct. 975, 983 (1990) (citing *Daniels v. Williams*, 474 U.S. at 331).

A distinguishing factor between the procedural and substantive guarantees of the Due Process Clause is the timing of the constitutional violation. If the substantive component of the Due Process Clause has been violated, the constitutional violation is complete as soon as the prohibited action is taken. Without more, an "independent federal remedy is then authorized by the language and legislative history of § 1983." *Daniels*, 474 U.S. at 338 (Stevens, J., concurring in judgments). However, in the context of procedural due process, the failure of the State to provide procedural redress or response is the crux of the constitutional violation. Thus, in many "tort-type" cases where private property has been damaged, the con-

stitutional violation occurs upon the State's failure to afford the claimants "adequate State remedies" to seek redress. *Id.*; *see Parratt v. Taylor*, 451 U.S. 527, 538, 68 L.Ed.2d 420, 430, 101 S.Ct. 1908, 1914 (1981), *overruled in part, not relevant here*, by *Daniels v. Williams*, 474 U.S. at 330-331.

Petitioners characterize the alleged due process violation as substantive in nature. In an attempt to convert what is essentially a procedural due process issue into a substantive due process issue, petitioners focus solely upon the damage inflicted upon their property, rather than viewing the entire sequence of events. Petitioners contend, irrespective of the context in which their property was damaged, such damage constitutes a violation of their right to substantive due process. However, since the *Lochner* era of this Court (*Lochner v. New York*, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905)), narrow circumscription of the substantive guarantees afforded by the Due Process Clause has been the guiding principle. *See Ferguson v. Skrupa*, 372 U.S. 726, 10 L.Ed.2d 93, 83 S.Ct. 1028 (1963).

Substantive due process rights, unlike, e.g., property rights, are created only by the Constitution. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229, 88 L.Ed.2d 523, 534, 106 S.Ct. 507, 513-514 (1985) (Powell, J., concurring). Casting aside the argument that text and ancient history are against the notion of substantive due process (*see Den v. The Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276, 15 L.Ed. 372, 374 (1856); *Ewing*, 474 U.S. at 225-226; *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 465 (7th Cir. 1988)), this Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce

and open-ended." *Collins v. Harker Heights*, 503 U.S. ___, ___, 117 L.Ed.2d 261, 273, 112 S.Ct. 1061, 1068 (No. 90-1279, February 26, 1992). As Justice White cautioned, "[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause," noting that, "Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Moore v. City of East Cleveland*, 431 U.S. 494, 544, 52 L.Ed.2d 531, 565, 97 S.Ct. 1932, 1959 (1977) (White, J., dissenting).

Proceeding with caution and restraint, the Court has reserved substantive due process protections for certain, specified areas of individual civil liberties that lie at the heart of a free society. The substantive component of the Due Process Clause protects only those interests that are "deeply rooted in this Nation's history and tradition." *Griswold v. Connecticut*, 381 U.S. 479, 501, 14 L.Ed.2d 510, 543, 85 S.Ct. 1678, 1691 (1965) (Harlan, J., concurring); *Moore*, 431 U.S. at 503. The Court has invoked substantive due process when government action interferes with rights "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L.Ed. 288, 292, 58 S.Ct. 149, 152 (1937). Stated another way, substantive due process protects against government action that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L.Ed. 674, 677, 54 S.Ct. 330, 332 (1934).

The Court has invoked the aid of substantive due process when a State has attempted to impermissibly "deprive" its citizens of their freedom of choice within the private realm of marriage, family life or procreation. This Court

found such "deprivations" violative of the substantive due process clause, irrespective of the procedural mechanisms afforded by the State. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925); *Poe v. Ullman*, 367 U.S. 497, 6 L.Ed.2d 989, 81 S.Ct. 1752 (1961); *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965); *Loving v. Virginia*, 388 U.S. 1, 18 L.Ed.2d 1010, 87 S.Ct. 1817 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed.2d 349, 92 S.Ct. 1029 (1972); *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973); and *Moore v. City of East Cleveland*, 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977). With all due respect, petitioners' right to be free from an *illegal* eviction, as compared to a legal eviction, is not one of the "fundamental" interests to which this Court has been willing to extend the heightened constitutional protection of substantive due process. *See Moore*, 431 U.S. at 537 (Stewart, J., dissenting); *Harrah Independent School District v. Martin*, 440 U.S. 194, 198, 59 L.Ed.2d 248, 254, 99 S.Ct. 1062, 1064 (1979); *Ewing*, 474 U.S. at 229-230 (Powell, J., concurring).

In an attempt to invoke the "shock the conscience" standard carefully delineated by this Court in *Rochin v. California*, 342 U.S. 165, 96 L.Ed.183, 72 S.Ct. 205 (1952) (*see also* 25 A.L.R. 2d 1396 (1952)), petitioners, in their brief, characterize respondents' actions as violative of their "fundamental right to their home." (Pet. Br. 50) Petitioners' mobile home was damaged during the illegal eviction. But, it is important to keep in mind that, even in a legal eviction involving a mobile home, disconnecting the utilities and "unmooring" the structure would be necessary. Again, with all due respect to petitioners, the incidental property damage that they sustained as the result of an illegal eviction is hardly the type of governmental conduct that

"offend[s] even the hardened sensibilities", that is "so offensive to human dignity" or that "shocks the conscience" of this Court so as to warrant protection under the substantive component of the Due Process Clause.

The crux of petitioners' claim is their illegal eviction from the mobile home park. The State of Illinois enacted the Forcible Entry and Detainer Act to provide its residents the complete remedy at law for settling disputes over possession of real property. *People v. Evans*, 163 Ill. App. 3d 561, 564, 516 N.E.2d 817, 819 (1987); Ill. Rev. Stat. 1987, ch. 110, par. 9-101 *et seq.* In derogation of the common law, this Act prohibits resolution of landlord/tenant disputes through forcible self help. *City of Chicago v. Steamship Lines*, 328 Ill. 309, 312, 159 N.E. 301, 303 (1927); *Doty v. Burdick*, 83 Ill. 473, 477 (1876).

The State of Illinois has chosen to channel landlord/tenant disputes through the judicial process, thereby affording the parties notice and a "right to be heard" prior to dispossession. The Forcible Entry and Detainer Act is the procedural mechanism whereby the State of Illinois "minimize[s] substantively unfair or mistaken deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 32 L.Ed.2d 556, 570, 92 S.Ct. 1983, 1994 (1972). As the facts of this case bear out, petitioners were "mistakenly deprived of their property" by the actions of respondents, and a state court action for damages should follow.

Petitioners' characterization notwithstanding, the Seventh Circuit Court of Appeals properly recognized that the facts of the instant cause necessitate resolution under the procedural component of the Due Process Clause. (J.A. 38-40)[3]

[3] *See Graham v. Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S. Ct. 1865 (1989). Although the cause there was pled and decided in the lower courts on substantive due process grounds, this Court evaluated the claim on Fourth Amendment grounds.

Petitioners were entitled to procedural due process: notice and an opportunity to be heard prior to being evicted from the mobile home park. However, it appears from the evidence that the eviction was accomplished through the "random and unauthorized" action by respondents. Petitioners have a cause of action for damages, but not one under the Civil Rights Act for a violation of the Fourth and Fourteenth Amendments.

The facts of this case fall squarely within the confines of *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), *overruled in part, not relevant here, by Daniels v. Williams*, 474 U.S. at 330-331, and *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984) (extending rationale of *Parratt* to intentional deprivations of property). In *Parratt*, a state prisoner brought a § 1983 action against prison officials, alleging that their negligent loss of his mail-order hobby kit "deprived [him] of his property and Due Process of Law." *Parratt*, 451 U.S. at 536. Analyzing Parratt's claim under procedural due process, this Court reasoned that, where the "tortious loss" of his property was the "result of a random and unauthorized act by a state employee, * * * the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur." *Id.* at 541. The Court found that, under these circumstances, "the existence of an adequate state remedy to redress property damage inflicted by state officers" provides all the process that is due. *Id.* at 542-544.

In the instant cause, petitioners were clearly not deprived of their property as the result of an established state procedure or policy. Rather, when circumventing the Illinois Forcible Entry and Detainer Act, the only evidence is that respondents acted in a "random and unauthorized" manner.[4] However, petitioners were not deprived of due process of law because the laws of the State of Illinois afford them post-deprivation redress for their property damage. Petitioners are clearly entitled to bring a state tort claim against respondents to recover damages for the incidental property damage they sustained. (*See, e.g., Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 525 N.E.2d 1176 (2d Dist. 1988) (trespass))[5] Petitioners do not contend that these state court remedies are inadequate to compensate them for the property damage incurred. Moreover, petitioners have in fact already sought and been afforded some redress for the illegal eviction (petitioners' mobile home was reinstated in the mobile home park pursuant to court order). (*See* Complaint, pars. 19, 20; J.A. 7-8, 30) Therefore, due to the adequate state remedies available and granted to petitioners through state procedures, petitioners were not deprived of procedural due process.

For the reasons set forth above, respondents respectfully request this Court affirm the decision of the courts below, finding there to be, as a matter of law, no violations of the Due Process Clause.

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[4] A conspiracy may in fact be a random act if, "from the point of view of the state[,] * * * the state cannot anticipate or control such conduct in advance." *Easter House v. Felder*, 910 F.2d 1387, 1399 (7th Cir. 1990), *cert. denied*, ___ U.S. ___ (1991) citing *Holloway v. Walker*, 790 F.2d 1170, 1172 (5th Cir. 1986), *cert. denied*, 479 U.S. 984 (1986). *See also National Communications v. Michigan Public Service*, 789 F.2d 370, 372-373 (6th Cir. 1986), *cert. denied*, 479 U.S. 852 (1986).

[5] Although the state remedies may not provide all the relief which may have been available under a § 1983 claim (e.g., attorneys' fees), the requirements of the due process clause are satisfied if the post-deprivation remedy compensates for the property damage. *Parratt v. Taylor*, 451 U.S. 527, 543-544, 68 L.Ed.2d 420, 434, 101 S.Ct. 1908, 1917 (1981).

IV.

PETITIONERS, WHOSE PROPERTY HAS BEEN DAMAGED AS THE INCIDENTAL RESULT OF AN ILLEGAL EVICTION, SHOULD NOT BE AFFORDED A 42 U.S.C. § 1983 CAUSE OF ACTION.

Petitioners assert that the Court of Appeals found, because "petitioners were really bringing a due process claim," the existence of adequate state remedies foreclosed relief on their Fourth Amendment claim. (Pet. Br. 37-46) The Court of Appeals, however, explicitly noted that the existence of state remedies has no bearing on whether a Fourth Amendment claim is actionable. (J.A. 41) As stated above, the Court of Appeals properly analyzed petitioners' Fourth Amendment claim and found that it must fail because no Fourth Amendment violation occurred.

The majority of the Court of Appeals stated:

> The existence of adequate legal remedies for an illegal eviction such as occurred here—state remedies if they are adequate, a federal remedy under the due process clause if not—is pertinent to deciding whether the Fourth Amendment should be bent to provide the Soldals with still another remedy. Bent it would have to be, because the amendment was never intended to regulate garden-variety commercial disputes of the sort involved in this case. Why bend, when the Soldals had adequate alternatives? (J.A. 56)

The above quoted portion merely evinces the Court of Appeals' recognition that there is an interplay between constitutional interpretation and our federalist system of government. As Judge Easterbrook made clear in his concurrence:

> Dragooning [a claim such as petitioners'] into federal court under the aegis of 42 U.S.C. § 1983 is lexically possible, for the fourth amendment is written broadly. * * * As the fourth amendment bars unreasonable

> action, a reading taking [privacy and property] interests to the limits transfers to the federal judiciary the power to decide whether every public action is reasonable. What is left for the rest of the Constitution—or for state law and democratic choice? (J.A. 68-69, Easterbrook, J., concurring).

The Civil Rights Act, 42 U.S.C. § 1983 prohibits conduct: (1) by a person acting under color of state law; (2) which deprives a person of the rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L.Ed.2d 420, 428, 101 S.Ct. 1908, 1913 (1981). An overly broad construction of § 1983 and the constitutional provision invoked may well permit litigants to use the federal courts to completely subsume areas of regulation traditionally left to the individual States and their democratic processes.

Section 1983 was originally enacted by Congress in 1871 to enforce the provisions of the Fourteenth Amendment against the States. *Monroe v. Pape*, 365 U.S. 167, 171, 5 L.Ed.2d 492, 496, 81 S.Ct. 473, 475 (1961), *overruled in part, not relevant here, by Monell v. New York Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). Enacted against the backdrop of rampant Ku Klux Klan activity, § 1983 sought to accomplish three main aims: (1) to override certain kinds of state laws, (2) to provide a remedy where state law was inadequate and (3) to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Monroe*, 365 U.S. at 173-174. Essentially, § 1983 was enacted to provide:

> * * * a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth

> Amendment might be denied by the state agencies. *Monroe*, 365 U.S. at 180.

The instant cause does not present the type of situation that needs to be redressed pursuant to § 1983. Random misjudgment or misbehavior on the part of lower echelon state employees should not be regulated by the federal government under the guise of § 1983.

Justice Frankfurter, dissenting from the majority decision in *Monroe v. Pape*, warned against expansive interpretation of § 1983:

> [S]ince it is projected into the future, it is ambulatory in scope, the statute properly absorbing the expanding reach of its purpose to the extent that the words with which that purpose is conveyed fairly bear such expansion. But this admissible expansion of meaning through the judicial process does not entirely unbind the courts and license their exercise of what is qualitatively a different thing, namely, the formulation of policy through legislation. *Monroe*, 365 U.S. at 244 (Frankfurter, J., dissenting).

Petitioners ask this Court to do exactly what Justice Frankfurter feared. Here, by a fortuity of the deputy sheriffs' mere presence, petitioners seek § 1983 redress from the federal court system for what was essentially a garden variety landlord/tenant dispute. As this Court has oftentimes recognized, property interests "are created and their dimensions are defined by existing rules or understandings that stem from * * * state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561, 92 S.Ct. 2701, 2709 (1972). Regulation of, and redress for, landlord/tenant disputes is an area that is peculiarly within the jurisdiction of the various States.

Petitioners challenge neither the usefulness nor the propriety of Illinois' Forcible Entry and Detainer Act, nor

its state remedies available to recompense petitioners for the property damage that they have suffered. Rather, they challenge the aberrant misconduct of lower echelon state officers. There is a crucial distinction between a challenge to an established state procedure and a property damage claim arising out of the misjudgment or misconduct of low level officers. In the latter situation, although the "under color of law" requirement may be literally satisfied, the "State action" required by the Fourteenth Amendment is not complete unless, and until, the State is unable to make the aggrieved individual whole for the damages he incurred at the hands of the state officers. *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978).

Under the instant set of facts, providing petitioner redress through the Federal Constitution would not serve any of the three aims for which § 1983 was enacted. This is what the Court of Appeals meant when it stated:

> Literally there was a "seizure" here, but to use a literal interpretation of a constitutional provision * * * would trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts. (J.A.58-59)

Divorcing the Federal Constitution and § 1983 from the notion of federalism, which is exactly what this Court would have to do to provide petitioners § 1983 redress, could begin the process of eventually subsuming an area of regulation traditionally and properly regulated by the individual States. This Court has often warned against reading the Constitution and § 1983 so as to create "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 47 L.Ed.2d 405, 413, 96 S.Ct. 1155, 1160 (1976).

In the instant cause, through a unique factual situation, petitioners have attempted to fashion a § 1983 cause of action. However, petitioners should not be afforded § 1983 redress for what is essentially a landlord/tenant dispute with incidental property damage. Section 1983 was not designed to "federalize" state tort claims. As this Court has recognized:

> Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. *Daniels v. Williams*, 474 U.S. 327, 332, 88 L.Ed.2d 662, 669, 106 S.Ct. 662, 665 (1986).

Through the democratic process, Illinois has fashioned a system of regulating "liability for injuries that attend living together in society." The Illinois Forcible Entry and Detainer Act, in conjunction with the tort claims mechanism, affords petitioners complete redress for the "random and unauthorized" property damage they have suffered at the hands of low level state employees. "Federalizing" the instant cause, through § 1983, could prove to be a very extensive and expensive remedy.

CONCLUSION

Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the District Court's order granting respondents' motion for summary judgment.

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Supreme Court of the United States

October Term, 1992

EDWARD SOLDAL, et al.,

Petitioners,

vs.

COOK COUNTY, ILLINOIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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SUMMARY OF ARGUMENT

The Soldal family was routed from its home when deputy sheriffs and private citizens seized the home and towed it away. Respondents argue that petitioners should be denied relief under 42 U.S.C. §1983, contending that there was no state action and that the seizure was not covered by the Fourth or Fourteenth Amendments. Their arguments would undermine the special protection the Fourth Amendment has always given to the sanctity and security of the home, and have no support in history or this Court's precedents. Here, both the privacy and possessory rights of petitioners were cruelly violated by county police officers; their home was taken away, their lives disrupted. This case presents precisely the type of oppressive government conduct that the Fourth and Fourteenth Amendments were intended to prevent.

ARGUMENT

I. THE ACTIVE PARTICIPATION OF SEVERAL DEPUTY SHERIFFS IN THE SEIZURE OF PETITIONERS' HOME CONSTITUTED STATE ACTION

Viewing the facts as seen by Edward Soldal and his family, several Cook County deputy sheriffs actively helped his landlord take Soldal's home and make it unusable.[1] They restrained Soldal from resisting the illegal eviction, they refused to charge the landlord with criminal damage to property, they stood between Soldal and

---

[1] Since the case is at the summary judgment stage, all factual inferences must be construed in favor of petitioners, and so long as there is a genuine issue of fact, and reasonable jurors could find for petitioners, summary judgment must be denied. *Adickes v. Kress and Co.*, 398 U.S. 149, 158-59 (1970); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986).

his landlord as workers carted off Soldal's home, and they arrested Soldal when he came to retrieve his children from the neighbors. The evidence showed a succession of meetings between the deputy sheriffs and landlord, admissions by the deputy sheriffs and private parties that they were working together, direct intervention by the deputy sheriffs to ensure that the seizure of petitioners' home was successful, and a concerted effort by the deputy sheriffs and private parties over a period of several hours, to ensure that petitioners were expelled from the mobile home park. *See* Pet. Br. 5-11. Against all this, respondent deputy sheriffs contend that this was only a "landlord/tenant dispute between private parties," and that they were merely present at the scene. Resp. Br. 5. Respondents' argument ignores the legal principles applicable to summary judgment, the standard of proof necessary to show state action, and the factual record. When these are considered, the Seventh Circuit's holding that "the condition of the record (the case was dismissed on summary judgment) requires us, as the panel opinion explained, to assume that there was a conspiracy between the private and public defendants" (J.A. 54), is wholly justified.

The simultaneous appearance of deputy sheriff O'Neill and the Willoway workers at the Soldal home at about 1:00 p.m. on September 4, 1987, and the statements of the workers and O'Neill, are in themselves sufficient evidence to support an inference of a prior agreement and show joint action.[2] The Willoway workers told Mr.

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[2] Even if deputy sheriff O'Neill were the only governmental participant in the joint action or conspiracy this would be sufficient to constitute state action. Private parties who conspire with public officials are liable under §1983 even if the official himself is not sued or is immune. *Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827 (1992); *Adickes v. Kress and Co.*, 398

Soldal to "ask the sheriff deputy" when he inquired what they were doing, and deputy sheriff O'Neill said he was there to see that Mr. Soldal did not interfere with Willoway's workers. The deputy sheriffs' active encouragement of the dispossession continued with lengthy meetings between Lieutenant Jones and agents of Terrace Properties, and Jones' statement to Mr. Soldal that the eviction was to continue and Mr. Soldal could not sign a complaint of criminal damage to property. Even respondents acknowledge that, prior to this time, they were aware that the dispossession was completely illegal.[3] Resp. Br. 4-5. By this time, there were four deputy sheriffs at the Soldals' home, all continuing to work with the Willoway workers, and all continuing to enforce O'Neill's initial order to Mr. Soldal that he must not interfere.

Lieutenant Jones continued his active cooperation with Willoway by telling Mr. Soldal to get his children and leave the park, and endorsing Hale's order that Mr. Soldal must leave and not come back. In addition, the failure of Chief Levy, Captain Jackson and Captain Wittsman to order the eviction stopped, at a time when they undoubtedly knew of its illegality, and had the power and duty to halt it, is evidence that they too entered into this common design to dispossess petitioners.

U.S. 144; *Dennis v. Sparks*, 449 U.S. 24 (1980). Moreover, a motion to amend the complaint to add O'Neill as a named defendant was pending at the time that the district court dismissed the case. If this Court reverses and remands the §1983 seizure claim, petitioners will again seek to add O'Neill as a named defendant.

[3] In addition, it is reasonable to infer that deputy sheriff respondents were aware of the illegality of Willoway's conduct at all times, both because the facts show they did have such knowledge and also because a dispossession is presumptively illegal, and is privileged only when authorized by a court order.

State action is established if a private party "acted together with or has obtained significant aid from state officials." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Moreover, a party can draw upon a wide array of evidence, direct and circumstantial, to prove a conspiracy claim and need not show a formal agreement. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1945). A conspiracy may be proven by "a course of dealing or other circumstances as well as in an exchange of words . . . Where the circumstances are such as to warrant a jury in finding that the conspirators have a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." *Id.* at 809-10. The ability and opportunity to conspire are circumstantial evidence of actual participation in a conspiracy. *Adickes v. Kress and Co.*, 398 U.S. at 158. In sum, there are a myriad of ways in which a conspiracy may be shown and "the existence or non existence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." *Id.* at 176 (Black, J., concurring). Under this legal standard, the facts established by petitioners warrant a reasonable jury to find that there was sufficient involvement by the deputy sheriffs to constitute state action.[4]

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[4] Deputy sheriff respondents have also argued that they are entitled to qualified immunity for their actions. Resp. Br. 11 n.2. No request for qualified immunity has previously been made, either in the district court, court of appeals, or respondents' brief in opposition to the petition for certiorari, and it should not be considered at this time, if at all. Petitioners will vigorously contest any claim of qualified immunity, if and when such claim is properly made. In addition, even if some or all of the public respondents were granted immunity this would not negate state action, and would not avail the private respondents. *Dennis v. Sparks*, 449 U.S. 24 (1980); *Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827 (1992).

II. THE SEIZURE OF PETITIONERS' HOME VIOLATED THEIR POSSESSORY AND PRIVACY INTERESTS PROTECTED BY THE FOURTH AMENDMENT

A. The Text and History Of The Fourth Amendment Support Petitioners' Right To Be Secure From Unreasonable Seizure Of Their Home.

The history surrounding the enactment of the Fourth Amendment, and the text of the Amendment itself, refute respondents' argument that the Amendment applies only to searches and seizures aimed at obtaining evidence. Respondents acknowledge that Writs of Assistance, and the wide authority they gave government agents to seize goods, were a major stimulus towards enactment of the Amendment. Resp. Br. 13. However, such seizures were not necessarily related to any criminal proceeding, or indeed any search for evidence, but rather to the recovery of uncustomed goods. Lasson notes that such writs authorized search and seizure but did *not* authorize arrest. Lasson, *The History and Development of the Fourth Amendment to the United States*, 53-54 (1937). Moreover, Writs of Assistance were themselves often used for private ends. In the *Writs of Assistance Case*, James Otis protested that the Writs allowed citizens to use "justices, sheriffs, constables, and all other officers" to search their neighbors' homes out of spite. John Adams reported that Otis argued:

> (O)ne of the most essential branches of English liberty is the freedom of one's house . . . . This writ (of assistance), if it should be declared legal, would totally annihilate this privilege.
>
> What a scene does this open! Every man prompted by revenge, ill-humor, or wantonness to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask for

> it from self-defense; one arbitrary exertion will provoke another . . . .

Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 Am. Crim. L. Rev. 1389, 1399. Lasson also recounts an incident where a customs officer was called before a justice to answer a charge and retaliated by searching the justice's house. Lasson, *The History and Development of the Fourth Amendment*, 60.

The text of the Amendment itself supports an expansive reading of its scope. The Amendment does not limit itself to criminal cases, or to searches for evidence, and contains no reference to the intention of the seizing officer. Rather, it declares in broad language that the security of the home shall not be violated by unreasonable seizures. The Amendment looks to the interests of the people in the security of their homes, interests that are affected equally whether the seizure is pursuant to a criminal investigation, a civil dispute, or for no reason at all. The Amendment is designed to protect the people from the arbitrary abuse of government power – precisely the type of abuse that occurred here.

B. Consistent Precedents Of This Court Reject The Limitations On The Fourth Amendment Urged By Respondents And Support Application Of The Amendment To The Seizure Of Petitioners' Home.

This Court has consistently held that the Fourth Amendment applies to all seizures that affect possessory or privacy interests in homes and effects. Here, the possessory and privacy interests of the Soldals were violated, so the Fourth Amendment was implicated, and the fact that the Soldals were not suspected of criminal wrongdoing did not deprive them of the protection of the Amendment.

i. The Fourth Amendment is not restricted to evidence-gathering.

This Court has never limited the Fourth Amendment to searches for evidence. The syllogism that pervades respondents' argument is that because many of this Court's holdings involve officers engaged in seizures of evidence, the Fourth Amendment applies *only* to such seizures.

Respondents cite *Boyd v. United States*, 116 U.S. 616 (1885), for its suggestion that the Fourth Amendment rests upon a person's right not to incriminate himself. But that portion of the *Boyd* opinion, and its holding that the Fourth and Fifth Amendments protect a person against forced production of documents, has been expressly overruled. *See Fisher v. United States*, 425 U.S. 391, 407-14 (1976).[5] *Boyd* remains an important case, however, not least for its recognition that the protections of the Fourth Amendment are not limited to persons suspected of criminal wrongdoing; *Boyd* itself was a civil forfeiture case.

There are several cases which hold the Fourth Amendment applicable when officers are not searching for evidence. *Camara v. Municipal Court*, 387 U.S. 523 (1967), held that the Fourth Amendment governed searches that were designed to improve health and safety conditions and help property owners in the identification of potential problems, rather than secure evidence to be used against the property owner. *Id.* at 537. Similarly, in *Michigan v. Tyler*, 436 U.S. 499 (1977), the search was made for the "vital social purpose of ascertaining the cause of the fire," *id.* at 507-08, not to seek evidence for any type

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[5] *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1903), Resp. Br. 14-15, rested upon the same now-discredited theory that the Fourth Amendment protects against forced production of documents.

of criminal or civil proceeding. Nevertheless, this Court held that the search was governed by the Fourth Amendment:

> [T]he 'basic purpose of (the Fourth) Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.' *Camara v. Municipal Court,* 387 U.S. 523, 528. The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection.

Id. at 504.

In *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1976), this Court held the Fourth Amendment applicable to a seizure of automobiles that was made to satisfy a tax assessment, not to obtain evidence. *Id.* at 351. And in *Hudson v. Palmer,* 468 U.S. 517 (1983), the court rejected the Fourth Amendment claim because the Fourth Amendment does not apply in a prison cell, not because the seizure and destruction was not aimed at obtaining evidence. *Id.* at 527 n.8. Moreover, the Court has consistently held that inventory searches, which by their very nature are not for the purpose of discovering evidence, are subject to the Fourth Amendment's command that searches be "reasonable." *South Dakota v. Opperman,* 428 U.S. 364 (1976); *Illinois v. Lafayette,* 462 U.S. 640 (1983); *Colorado v. Bertine,* 479 U.S. 367 (1986).

In *O'Connor v. Ortega,* 480 U.S. 709 (1987), the motivation for the search of Dr. Ortega's office and the seizure of property was disputed. Dr. Ortega alleged it was to obtain evidence to use against him, while the hospital claimed it was merely a routine inventory of state property in the office of a terminated employee. *Id.* at 713. This Court was clear that the Fourth Amendment would

apply under either scenario, and enunciated the appropriate Fourth Amendment standards for both a "noninvestigatory work-related intrusion" and "an investigatory search for evidence of suspected work-related employee misfeasance." *Id.* at 723.

In its discussion of drug testing, this Court has not required that the search or seizure be for the purpose of gathering evidence against the person searched for the Fourth Amendment to apply. The toxicological tests in *Skinner v. Railway Labor Exec. Assn.,* 489 U.S. 602 (1989), were administered "not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.' " *Id.* at 620-21. Nevertheless, the search or seizure (*see, id.* at 617 n.4), was governed by the Fourth Amendment. Similarly, in *Treasury Employees v. Von Raab,* 489 U.S. 656 (1989), where the search was "not designed to serve the ordinary needs of law enforcement," but rather to "deter drug use" and "prevent the promotion of drug users to [sensitive] positions," *id.* at 666, the Court also held the Fourth Amendment applicable, with no suggestion that the Amendment controlled only if the intrusion was aimed at obtaining evidence.

Not only does the contention that the Fourth Amendment applies only to evidence gathering lack textual and precedential support, it also makes very little sense. If police are liable only when they are seeking evidence then "the worst kind of police search . . . , the search of the known innocent for purposes purely of harassment," Posner, *Rethinking the Fourth Amendment,* 1981 Sup. Ct. Rev. 49, 54, would fall outside of constitutional protection. Under respondents' theory, if police arbitrarily entered a supermarket and destroyed food they unreasonably claimed was contaminated, but did not retain

any of the food as evidence, they would be untouched by the Fourth Amendment. The more unreasonable the motivation for the seizure, and the less related it was to legitimate governmental ends, the more likely it would be that the Fourth Amendment would not apply.

ii. The Fourth Amendment protects property rights.

In *United States v. Place*, 462 U.S. 696, 701 (1982), this Court, holding that a violation of property rights was subject to the Fourth Amendment, noted that "the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment." Respondents, however, contend that the Fourth Amendment affords no protection to property rights, and that "a seizure of property in plain view is presumptively reasonable." Resp. Br. 20.

Respondents cite several cases that stress the importance of privacy concerns in Fourth Amendment jurisprudence, but such concerns do not negate the Amendment's protection of property rights, since privacy and property rights are in no way antagonistic and may often, as here, complement each other. *See, e.g., United States v. Place*, supra. Moreover, many of the cases cited by respondents run directly contrary to their argument. *Katz v. United States*, 389 U.S. 347, 350 (1967), held that Fourth Amendment "protections go further [than protecting individual privacy] and often have nothing to do with privacy at all," and then emphasized this point by quoting from Justice Black's dissent in *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965), in which he refers to a public seizure of property as violating the Fourth Amendment. *Katz*, 389 U.S. at 350 n.4.

Respondents also completely misconstrue the earlier case of *Warden v. Hayden*, 387 U.S. 294 (1967). In *Warden*

the Court stressed the importance of looking to expectations of privacy, rather than property rights, in determining whether a defendant's Fourth Amendment *privacy* rights were violated, but also held that, once the Amendment's privacy concerns had been satisfied, a seizure of property would still violate the Amendment unless there was a "nexus between the item to be seized and criminal behavior." *Id.* at 307. *Wyman v. James*, 400 U.S. 309 (1971), discussed at Resp. Br. 19, is simply irrelevant because it involved no seizure of property, but rather an alleged violation of privacy. Although the home visit by the case worker was for the purpose of helping the client, not to discover evidence to use against her, the Court held that the Fourth Amendment applied, but was not violated, because the visit did "not descend to the level of unreasonableness." *Id.* at 318. *Cardwell v. Lewis*, 417 U.S. 583 (1973), did, in the portion of the opinion quoted by respondents, stress the importance of privacy, rather than property, rights in determining whether a *search* of a car was constitutional. But in discussing the constitutionality of the *seizure* of the car – a portion of the opinion that respondents wholly ignore – the Court rested its decision on probable cause and the car's mobility, not privacy. *Id.* at 592-96. The court could not have been clearer that there were two different issues: a search in which privacy concerns, not property rights, were paramount, and a seizure in which probable cause and exigent circumstances rendered the violation of property rights reasonable.

Respondents' discussion of the "plain view" doctrine wrongly analyzes the cases it cites, ignores the many cases that run contrary to its thesis, and arrives at the remarkable conclusion that police may seize anything in

plain view. Respondents' assertion that protection of privacy is at the heart of the plain view cases is simply wrong. The concept of plain view arises only after privacy concerns have been satisfied, i.e., "when an officer's access to an object has some prior justification under the Fourth Amendment." *Texas v. Brown*, 460 U.S. 730, 738 (1982). At that point, "the owner's remaining interests in the object are merely those of possession and ownership," *id.* at 739, interests which are overcome if there is probable cause to believe the object is evidence of a crime, or is contraband. *Id.* at 742; *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Arizona v. Hicks*, 480 U.S. 321 (1986).

Contrary to respondents' assertion, there are numerous decisions by this Court holding that violation of property rights alone can violate the Fourth Amendment. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), one basis for the court's decision to reverse the conviction was the unreasonable seizure of the car, a seizure that, in itself, violated no privacy rights. Although *Coolidge's* inadvertence requirement for plain view seizures was subsequently overruled in *Horton v. California*, 496 U.S. 128 (1990), *Horton* re-emphasized that the Fourth Amendment protects bare possessory interests:

> The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.

Id. at 133. *Texas v. Brown*, 460 U.S. 730 (1982), involved no privacy concerns, since the suspicious object could be seen from outside the vehicle, but the seizure did affect property rights and thus was analyzed as a potential

Fourth Amendment violation. *Id.* at 741-2. In *Cardwell v. Lewis*, 417 U.S. 583, 592-96 (1974) and *United States v. Jacobsen*, 466 U.S. 109 (1983), the Court discussed the reasonableness of a seizure after having first concluded that no privacy concerns were violated, and in *Jacobsen* directly held that the Fourth Amendment's prohibition of unreasonable seizures could be violated by interference with property interests alone. *Id.* at 124-25.

Respondents completely distort the holding of *United States v. Place*, supra. The Court did not rest its analysis on the fact that the detention of the luggage was for the purpose of investigating its contents, and did not hold that Place's legitimate expectations of privacy in his luggage were implicated. Indeed, the Court specifically held that the detention was *not* for the purpose of a search, since a search would have required probable cause, which was lacking. *Id.* at 706-07. Rather, the Court looked to the interests of the traveler and identified two separate Fourth Amendment interests that were violated by the seizure – his "possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.* at 708. *Place* is thus wholly consistent with this Court's holdings that the Fourth Amendment protects property as well as privacy. Respondents' argument to the contrary is concocted by lifting inapposite quotations from this Court's discussions of privacy interests, distorting and transporting them outside of their context, and pretending that the Court was discussing property interests when in fact it was not. In many cases, as here, the violation of property interests implicates, coincides with, or exacerbates violations of privacy interests. However, even if there is only a bare violation of possessory interests, the Fourth Amendment must be satisfied.

iii. Petitioners' privacy rights were violated.

The Soldals' home was taken away, their family broken up, they were forced to live in a building that was not their home, to travel when and where they did not choose, to sleep in beds that were not their own, and to otherwise rearrange their daily activities to accommodate this massive disruption in their lives. Respondents argue that this did not violate petitioners' Fourth Amendment right to privacy because their secrecy was not violated. Resp. Br. 23-26. This parsimonious reading of the Fourth Amendment is at odds with this Court's consistent protection of the sanctity of the home, and with the specific holding of *United States v. Place*, supra.

This Court has often noted that the Fourth Amendment protects reasonable expectations of privacy, and has not restricted the Amendment only to reasonable expectations of secrecy. *See, e.g., Katz v. United States*, 389 U.S. 347; *Smith v. Maryland*, 442 U.S. 735, 740 (1978). Moreover, the Court has always granted special protection to the home. The Court has held that the Amendment provides protection against "invasions on the part of government of the sanctity of a man's home *and* the privacies of life" *Boyd v. United States*, 116 U.S. 616, 630 (emphasis added), and has declared that "at the very core (of the Fourth Amendment) stands the right of a man to retreat into his own home and there be free from unreasonable governmental *intrusion.*" *Silverman v. United States*, 365 U.S. 505, 511 (1961) (emphasis added). It has noted that the Fourth Amendment provides protection against "the right of officers to thrust themselves into a home," and safeguards society's choice "to dwell in reasonable security *and* freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1947) (emphasis added). In *Payton v. New York*, 445 U.S. 573 (1979), the Court was not concerned with secrecy when it held unconstitutional a warrantless

entry into a home for purpose of arrest, not search, but based its ruling on the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Id.* at 601. And *Oliver v. United States*, 466 U.S. 170 (1983), stressed that the Fourth Amendment protects "intimate activities" in the home "from government *interference* or surveillance." *Id.* at 179 (emphasis added). This Court's Fourth Amendment decisions do not protect only a person's right to secrecy in his home but also a much broader right to engage in lawful activities without governmental intrusion.

Moreover, in *United States v. Place*, supra, this Court identified Fourth Amendment privacy interests outside the context of the home in circumstances directly relevant to this case. Respondents fail to cite or discuss *Place* in this portion of their argument, but as the *en banc* dissent recognized (J.A. 76-77), the injury to petitioners' privacy interests was far greater than the injury in *Place*. In *Place*, respondent's ability to continue his travel was compromised by the ninety minute detention of his luggage, and this violated his Fourth Amendment liberty interest in continuing on his journey. In this case, petitioners' ability to continue with their activities of everyday life was not just compromised but eradicated by the seizure of their home.

This is a classic case of abuse of government power to invade and violate the sanctity and security of the home that is guaranteed by the Fourth Amendment. The Fourth Amendment should govern.

III. 42 U.S.C. §1983 IS AN APPROPRIATE REMEDY FOR THIS CONSTITUTIONAL VIOLATION

Respondents, arguing that "random misjudgment or misbehavior on the part of lower echelon state employees should not be regulated by the federal government under

the guise of §1983" (Resp. Br. 36), contend that petitioners should be denied relief because "providing petitioner (sic) redress through the Federal Constitution would not serve any of the three aims for which §1983 was enacted." Resp. Br. 37. Thus, respondents, in effect, ask this Court to restrict the scope of the Constitution based on their statutory construction of §1983. Such arguments have always been rejected by this Court.

42 U.S.C. §1983 renders liable in damages "every person who, under color of any statute, ordinance, regulation, custom or usage of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or amenities secured by the Constitution and laws." Section 1983 does not create rights, nor does it take them away. Rather, it is a mechanism for the enforcement of rights which are otherwise established. If respondents violated petitioners' constitutional rights, and if they are not entitled to a defense such as immunity, then they also violated §1983. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961).

Respondents also argue that actions taken under color of state law do not necessarily satisfy the "state action" requirement of the Fourteenth Amendment, and contend that such "state action" is missing here. Resp. Br. 37. This Court has long held, however, that "it is clear that in a §1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1981); *see also, Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966); *West v. Atkins*, 487 U.S. 42, 49 (1988). Respondents make no argument as to why this long line of authority should be overruled; they just ignore it.

Likewise, respondents contend that the existence of potential state law remedies should prevent petitioners from suing to vindicate the violation of their constitutional rights, but provide no compelling reason for overruling *Monroe v. Pape*, supra, *Zinermon v. Burch*, 494 U.S. 113 (1989), and a host of other cases which hold that "the federal [§1983] remedy is supplementary to the state remedy" *Monroe*, 365 U.S. at 163, and that "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under §1983." *Zinermon v. Burch*, 494 U.S. at 124. Respondents urge the Court to depart from this doctrine by threatening that provision of a remedy here will prove "extensive and expensive" and may "begin the process of eventually subsuming an area of regulation traditionally and properly regulated by the individual states." Resp. Br. 38, 37. In fact, providing petitioners justice under §1983 will do nothing to the sort. As respondents note, this case involves a "unique factual situation" (Resp. Br. 38), which is unlikely to recur with any regularity.

Moreover, this was not, as respondents contend, a mere commercial dispute. Respondents' persistent misdescription of this case as "a garden variety landlord/tenant dispute" (Resp. Br. 36, 2, 5, 26, 31, 38), ignores the crucial difference made by the intervention of armed police officers.[6] It was this intervention by state officers

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[6] This distortion of the factual record also pervades and undermines the *amicus* brief in support of respondents filed by the National League of Cities *et al.* That brief, which argues that, even if there was a Fourth Amendment seizure, it was reasonable, rests upon the erroneous assumption that all the deputy sheriffs did was stand by to keep the peace. While respondents are free to urge this version of the facts to a jury at trial, it is hardly uncontested, and cannot possibly provide the basis for summary judgment. *See supra* at 1-5.

on the side of the lawbreakers which both facilitated the seizure and fundamentally changed this from a private dispute to a constitutional violation. Had the deputy sheriff respondents behaved properly and in accordance with the law, this would not have been a constitutional case. Respondents could either have adopted a policy of strict non-interference, allowing petitioners to assert their right to resist the illegal seizure, or, more properly, should have prevented Terrace Properties' violations of state law, by threatening to arrest its employees if they proceeded with the trespass to petitioners' home. Thus, providing petitioners a §1983 remedy here will not swamp the courts with a flood of commercial litigation. In most cases, the police will act reasonably and will not ally themselves with lawbreakers. But when they act unreasonably, it is right and salutary that they should pay for their constitutional violations.

IV. PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED

Respondents argue that their actions in summarily seizing and damaging petitioners' home were not sufficiently egregious to "shock the conscience," and that therefore petitioners' substantive due process rights were not violated.[7] This argument rests upon respondents' slant of the facts in the light most favorable to them, which is not appropriate on a motion for summary judgment. Because a fair view of the facts shows that there

[7] Respondents also argue that the existence of adequate state remedies forecloses any claim by petitioners for violation of their rights to procedural due process. This is not an issue in this case since petitioners have not pursued a procedural due process claim.

was a violation of petitioners' substantive due process rights, respondents' argument should be rejected.

The facts before the court of appeals and this Court "support an inference that the trailer park employees, aided by the actions of the sheriff's deputy, deliberately damaged the trailer" (J.A. 47, Judge Flaum dissenting), and deprived petitioners of their home. Respondents seek to characterize this as merely an illegal eviction with normal consequential damage, but it was clearly much more than that. The type of activity engaged in by these respondents implicated precisely the same type of values as the municipal ordinance at issue in *Moore v. East Cleveland*, 431 U.S. 494 (1976). There, the Court stressed the long established protections for the sanctity of the family and the home, and held that interference by the state with family life is subject to careful examination by this Court.

Though respondents quarrel with petitioners' characterization of their actions as depriving petitioners of their "fundamental right to their home," this is precisely what occurred. Surely it would "shock the conscience" for a municipality to hire armed agents to arbitrarily roust its citizens from their homes and then damage the structures so as to make them uninhabitable. This is what respondents did here. The crux of petitioners' claim is not an illegal eviction without proper process. Rather, it is the wholesale disregard of their uncontested legal right to continued quiet possession of their home, and to live their life free from arbitrary intrusion. This is a right that is sufficiently precious to be protected by the substantive component of the Due Process Clause.

CONCLUSION

The Fourth Amendment protects petitioners' privacy and possessory rights against violation by these deputy sheriff respondents, and private parties. A jury should determine whether respondents' actions were reasonable and whether they violated petitioners' substantive due process rights.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1991

EDWARD SOLDAL, et al.,

Petitioners,

v.

COUNTY OF COOK, et al.,

Respondents.

CORRECTED COPY

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The amici curiae will address the following question:

Whether the Fourth Amendment's prohibition of unreasonable seizures is implicated, and whether a remedy under 42 U.S.C. § 1983 for violation of that prohibition may be available, when state officials forcibly and illegally remove a family's trailer home from its site.

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BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS IN SUPPORT OF PETITIONERS

The American Civil Liberties Union and American Civil Liberties Union of Illinois submit this brief as amici curiae in support of petitioners.*

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit organization with over 300,000 members, dedicated to the protection and defense of the civil rights and civil liberties of all Americans. The ACLU of Illinois is one of its state affiliates. Amici have long been active in the defense of individual liberties guaranteed by the Fourth Amendment, having appeared before this Court in numerous Fourth Amendment cases both on direct representation and as amici. See, *e.g.*, *Michigan Dep't of State Police* v. *Sitz*, 110 S. Ct. 2481 (1990); *Graham* v. *Connor*, 490 U.S. 386 (1989); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989).

Among the individual liberties at the core of the Fourth Amendment which the ACLU seeks to protect from unwarranted government intervention is the sanctity and solitude of one's home. This right encompasses constitutionally protected possessory interests, and embodies substantial privacy and liberty components as well. Because the extraordinary abuse of power by government officials in this case to physically wrest away petitioners' home implicates these important values, the ACLU is concerned about the alarming decision of the court of appeals which places severe limitations on remedies available to persons who are wronged by such lawless action.

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* Written consents of the parties to the filing of this brief have been filed with the Clerk.

We respectfully believe that our involvement in and familiarity with Fourth Amendment issues will assist the Court in considering the issues presented by this case.

STATEMENT

Because petitioners' 42 U.S.C. § 1983 civil rights suit alleging violation of their Fourth Amendment rights was dismissed below on a motion for summary judgment, the record must be construed in the light most favorable to their claim. On that basis, the facts necessary to decide this case are very simple.

The Soldal family, Edward, his wife Mary, and their four minor children, like millions of other Americans owned and made their home in a trailer or "mobile home" -- a misnomer, since trailer homes are "largely immobile as a practical matter." *Yee* v. *City of Escondido*, 60 U.S.L.W. 4301, 4302 (U.S. Apr. 1, 1992). They rented a site or "pad" for their home in an Illinois trailer park from respondent Terrace Properties. Employees of Terrace (also named as respondents) illegally evicted the Soldals from the trailer park without obtaining an eviction order from a court. These employees disconnected the Soldals' home from basic utilities by wrenching sewer and water connections off its side and cutting off the telephone; then they tore off the trailer's canopy and skirting. Pet. App. B 1244. They thereafter hitched the home to a tractor, pulled it free of its moorings, and towed it to a nearby lot, where they left it in a damaged and unusable state. Some members of the Soldal family had to spend the night in a motel; the others stayed in a friend's trailer. *Ibid.*

Terrace's employees conspired in the removal of the Soldals' home from the trailer park with the respondent Cook County deputy sheriffs, who were present throughout the eviction for the avowed purpose of preventing Mr. Soldal from interfering with the illegal towing-away of his home -- that is, to prevent Soldal from exercising his right under Illinois law to take reasonable steps to defend against an unlawful eviction. Because it is well-established that co-conspirators are responsible in law for each other's acts, the Seventh Circuit properly held that this case must be treated in

its current posture "as if the deputy sheriffs themselves seized the trailer, disconnected it from the utilities, and towed it away," and "[e]quivalently * * * as if they had deputized the private defendants to assist them," so that the private defendants were acting as state officials. Pet. App. A 1075. That holding is not in issue in this case, and for present purposes it must be assumed that "*all* of the defendants * * * acted under color of state law" (*ibid.*), and that all were equally responsible for the violation of petitioners' rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, amici will address two of the issues presented by this case: First, whether a "seizure" occurs within the meaning of the Fourth Amendment when state officials physically remove a family's trailer home from its site in violation of state law; second, whether the victims of the seizure are barred from maintaining a suit under 42 U.S.C. § 1983 for violation of their Fourth Amendment rights because "the dominant character of the conduct challenged * * * is a repossession or eviction conventionally challenged [as a deprivation of] due process," which for Section 1983 purposes "determines the [only] constitutional standard under which [the conduct may be] evaluated." Pet. App. A 1080.

A bare majority of the Seventh Circuit Court of Appeals held, en banc, that although the physical removal of a person's home is undeniably a "seizure" in the ordinary sense of that term, it does not constitute a "seizure" for Fourth Amendment purposes because "*no* interest protected by the Fourth Amendment is involved." Pet. App. A 1080. The Fourth Amendment, the court held, protects only against invasions of privacy or liberty, or of possessory interests infringed incident to such invasions, and it does not reach "mere" seizures of property. *Id.* at 1076-1080. Because the seizure of petitioners' home, according to the majority below, infringed only the family's property rights, and not their privacy or liberty (*id.* at 1078, 1079-1080), it did not implicate their Fourth Amendment rights.

In addition, the court of appeals held that even if "there is some element or tincture of a Fourth Amendment seizure" when state officials tow away a family's home, still the *dominant* character of the state's action is a violation of property rights. The majority ruled, based on its reading of *Graham* v. *Connor*, 490 U.S. 386 (1989), that it is the dominant character of challenged conduct that provides the sole constitutional standard for its evaluation in a Section 1983 suit. The court found that petitioners' claim is therefore cognizable in a Section 1983 action only as a deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment. Pet. App. A 1080.

None of the Seventh Circuit's three central holdings -- that the Fourth Amendment does not apply to seizures of property rights "as such" (Pet. App. A 1079); that the seizure of the Soldal family's home infringed only their property rights; and that even if other interests were implicated, it is only the "dominant" character of the seizure as a property violation that would be actionable in a Section 1983 suit, as a due process violation -- bears any discernable relation to this Court's precedents, and each is truly extraordinary as a matter of constitutional or statutory interpretation. Indeed, so mistaken are these determinations that it would be very difficult to conceive of their genesis, were it not for the court of appeals' disclosure that it considered these new rules necessary to prevent plaintiffs "trivializing" the Fourth Amendment by using it as a sword in "garden-variety commercial disputes of the sort involved in this case," increasing the workload of the federal courts in the process. *Id.* at 1076, 1077. That reasoning is seriously flawed. It rests on a mischaracterization of the dispute in this case that denigrates the interests of a large number of Americans who live in trailer homes; it misjudges the effects of holding the Fourth Amendment to be implicated by the seizure at issue here, and of holding Section 1983 suits to be available to remedy unreasonable seizures of this sort; and it relies on an illegitimate reason for overriding a textually and precedentially justified interpretation of the Fourth Amendment's scope. In short, the court of appeals majority has stripped the Fourth

Amendment of a significant part of its content and has called into question decades of consistent Fourth Amendment jurisprudence.

Respondents' conduct in this case was precisely the sort of lawless and arbitrary abuse of state power that the Fourth Amendment originally was meant to prohibit. Properly interpreted, the Fourth Amendment requires that state officials, before forcibly dispossessing a citizen of his or her home, comply with the procedures mandated for other (less drastic) searches and seizures. The holding to the contrary below represents a dangerous and unprecedented restriction of Fourth Amendment freedoms that should not be allowed to stand.

ARGUMENT

I. THE STATE'S UNLAWFUL REMOVAL OF THE SOLDALS' TRAILER HOME WAS A SEIZURE WITHIN THE SCOPE OF THE FOURTH AMENDMENT.

The Seventh Circuit held in this case that state officials' actions in forcibly disconnecting the Soldal family's home from utilities, stripping it of its skirting and canopy, and physically removing the home from its site in a trailer park to a nearby lot, where they left it disabled, did not even implicate (let alone violate) the Fourth Amendment's protection of "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable * * * seizures." The court reasoned that these actions involved no "seizure" within the meaning of the Amendment. It justified this extraordinary interpretation by positing a new constitutional order, in which the Fourth Amendment protects only privacy and liberty interests (and property interests closely incident thereto), leaving property interests "as such" to be covered by the Due Process or Takings Clauses of the Fifth and Fourteenth Amendments. Beyond a spurious neatness, this approach has absolutely nothing to recommend it. The removal of the Soldals' home was a "seizure" within the plain language of the Fourth Amendment and within the meaning that has

consistently been attributed to the term in this Court's Fourth Amendment jurisprudence.

In any event, even as misinterpreted by the court of appeals, the Fourth Amendment clearly encompasses the state's confiscation of the Soldals' home in this case. The court's determination that removal of the home did not infringe the Soldals' interests in privacy and liberty is wholly without merit, resting on an unrealistic conception of privacy and liberty as those interests are implicated by the living arrangements in which millions of Americans find themselves, either by choice or as the result of economic standing, and on a blinkered view of this Court's precedents.

A. Seizures Of Property Like The Removal Of The Soldals' Home Must Be Judged Under The Fourth Amendment's Reasonableness Standard.

Because the Soldals' home was physically confiscated by persons acting as state officials, "in a literal sense [there was] a 'seizure' of the[ir] home and its contents," as the court of appeals was obliged to acknowledge. Pet. App. A 1076. The plain language of the Fourth Amendment -- the ordinary meanings of the verb "to seize" as being "to possess or take by force" or "to take hold of" something (Webster's Third New International Dictionary 2057 (1971)) -- undeniably and exactly covers the removal of the Soldals' home from its site.

In spite of the straightforward and unmysterious nature of the constitutional text, the court of appeals held there was no seizure in this case within the meaning of the Fourth Amendment. As the first step toward reaching this surprising conclusion, the court conceived a new principle for organizing constitutional claims in a neat and undemanding way -- a principle it deemed to be more important than fidelity to the text. "[I]nterests in property," the court announced, are henceforth to be treated as being "protected by different * * * provisions" of the Constitution than interests "in (Fourth Amendment) privacy" or liberty, and "deprivations of property [are] to be regulated by the due process [or takings]

clause[s]" only -- not by the Fourth Amendment. Pet. App. A 1077-1078.

In order to adopt this novel constitutional analysis, the Seventh Circuit had to sweep away a remarkably consistent line of decisions by this Court to the effect that it is property interests that lie at the core of the Fourth Amendment's protection against unreasonable seizures. These precedents, however, cannot be so readily discarded.

This Court's "seizure" precedents often talk about "intrusion on possessory interests." *United States* v. *Place*, 462 U.S. 696, 705 (1983). Thus in *United States* v. *Jacobsen*, 466 U.S. 109 (1984), for example, the Court explained that a Fourth Amendment seizure occurs whenever there is "some meaningful interference with an individual's possessory interests in * * * property" (*id.* at 113), and that the reasonableness of a seizure is to be judged by weighing the reasons for it against its impact on "protected property interest[s]." *Id.* at 125. See also, *e.g.*, *Arizona* v. *Hicks*, 480 U.S. 321, 324 (1987) (recording of serial numbers on stereo equipment not a seizure because "it did not 'meaningfully interfere' with * * * possessory interest[s] in either the serial numbers or the equipment"); *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985). According to these precedents, the existence of a seizure depends simply upon whether the owner's full dominion and control over the property has been impeded in some way.

The distinction between the protection of property interests on the one hand and privacy and liberty interests on the other -- which the court of appeals would attribute to their coverage by different constitutional provisions -- is in fact drawn by the terms of the Fourth Amendment itself. This Court recognized in *Hicks* that "the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures." 480 U.S. at 328. The Court cited with approval (*ibid.*) Justice Stevens' articulation in *Texas* v. *Brown*, 460 U.S. 730, 747 (1983) (concurring): the Fourth Amendment "protects two different interests of the citizen -- the interest in retaining possession of property and the interest

in maintaining personal privacy," and "[a] seizure threatens the former." See also *Horton* v. *California*, 496 U.S. 128, 133 (1990) ("The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property").

Of course, interests in property, privacy, and liberty will often all be affected in varying degrees by a particular search or seizure -- as they were by the seizure in this case (see *infra*, pp. 13-16), and as they are when a search involves rummaging through personal effects or when it is a person who is seized. But the essence of a seizure, as this Court has so often stated, is that it infringes part of the bundle of rights "to possess, use and dispose of" property that are the hallmarks of ownership (and, with appropriate modification, of lesser interests in property as well). *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945).

The court of appeals' hypothesis that the Fourth Amendment does not protect possessory interests alone and that seizures must involve an invasion of privacy or liberty leaves any number of this Court's Fourth Amendment rulings inexplicable on their facts. For example, in *Jacobsen*, 466 U.S. at 120 & n.18, this Court held that a package had been "seized" even though it was previously opened by a private party, thus extinguishing any protectible privacy interest vis-à-vis the government. Though no privacy interests were at stake, the decision of government agents to take possession of the contents of the package and test them was subject to Fourth Amendment limits: "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests. * * * Here, the field test did affect respondents' possessory interests protected by the Amendment." *Id.* at 124-125. *Jacobsen* would have been wrongly decided on the theory applied by the court of appeals, because the absence of a protectible privacy interest should conclusively have negated any possible Fourth Amendment seizure of the opened package.

The inconsistencies by no means end at *Jacobsen*. In *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351-352 (1977), the Court tested the impoundment of vehicles located in open areas against the Fourth Amendment reasonableness standard. It treated the fact that no privacy interest had been infringed as relevant to the reasonableness of the seizure -- but as wholly irrelevant to the question whether a seizure had occurred in the first place. And in *Horton*, the Court held that seizure of an item in plain view "generally does implicate the [Fourth] Amendment's limitations upon seizures of personal property" (496 U.S. at 133 n.5), even though "the seizure *does not involve an intrusion on privacy*" (*id.* at 141) (emphasis added). See also *United States* v. *Salvucci*, 448 U.S. 83, 91 n.6 (1980) (persons whose property is wrongfully seized may seek return of that property under the Fourth Amendment irrespective of privacy concerns); *Katz* v. *United States*, 389 U.S. 347, 350 (1967) (The Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all").

Moreover, given the Fourth Amendment's general applicability to administrative searches and seizures (see *Camara* v. *Municipal Court*, 387 U.S. 523 (1967)), the Seventh Circuit majority's categorical refusal to subject the conduct at issue here to Fourth Amendment scrutiny because in the majority's view it infringed only possessory interests would create some remarkably anomalous distinctions. Under the Seventh Circuit's theory, for example, government health and safety inspectors would be required to obtain a warrant to enter a home (*id.* at 532-533), but the Fourth Amendment would have no application at all to the government's total removal and confiscation of the home.

To support its view that Fourth Amendment seizures can only derive from intrusions on privacy or liberty, the court of appeals relied entirely upon *Hudson* v. *Palmer*, 468 U.S. 517 (1984). But it is clear that *Hudson*'s determination that the Fourth Amendment does not apply to seizures of property of prison inmates "was premised on the Court's conclusion that prison

inmates have neither privacy *nor possessory* rights in property maintained in their jail cells." Pet. App. A 1085. See 468 U.S. at 538 (O'Connor, J., concurring) ("The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects"). In fact, Justice Stevens dissented at length from precisely this aspect of the majority's opinion. See *id.* at 542. *Hudson* thus reinforces the fact that Fourth Amendment seizures depend only upon the existence of property interests, the presence of which is not in dispute here.

The Seventh Circuit's artificial restriction on Fourth Amendment protection for property interests is unjustified as a reading of the text of the Amendment, or as an interpretation of this Court's precedents. This Court should see the decision below for what it is -- an aberrational reaction to the court of appeals' misplaced fear about the expansion of federal litigation -- and reject it in favor of the traditional view that the Fourth Amendment protects against unreasonable interference with property interests.

B. Recognition That The Fourth Amendment Is Implicated By The Removal Of The Soldal Family's Home Invites No Undue Expansion Of Federal Litigation.

The court of appeals made no effort to disguise the fact that its narrow interpretation of the scope of Fourth Amendment protection against "seizures" was substantially driven by a fear of expanded federal litigation, and of the supposed need to develop new federal common law by which to judge the reasonableness or otherwise of evictions like the one that gave rise to this suit. The court of appeals majority argued that to interpret "a constitutional provision enacted two centuries ago [literally] to make every repossession and eviction with police assistance actionable under -- of all things -- the Fourth Amendment would both trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts." Pet. App. A 1077. See also *id.* at 1081 (Easterbrook, J., concurring) (interpretation urged by petitioners would "requir[e] *substantive* federal review of the 'reasonableness'" of state actors' decisions). These concerns, however, are both misplaced and illegitimate.

To begin with, reversal in this case will not unleash a flood of new federal litigation. As we have shown above, this Court's precedents have long established that the Fourth Amendment protects against unreasonable seizures of property as such; yet this case appears to be unique. Moreover, the parade of horribles recounted by Judge Easterbrook (Pet. App. A 1081) greatly exaggerates the consequences of the textually and precedentially justified interpretation of the term "seizure" that we urge this Court to reaffirm. It is simply not the case that a ruling in petitioners' favor would mean that "[p]ublic employees repairing a street [who] negligently rupture a gas main, requiring the evacuation of a city block" could be sued in damages under Section 1983 for a violation of the Fourth Amendment. *Ibid.* It is impossible to identify in that situation any palpable property interest that can accurately be said to have been "seized" in any ordinary sense of that term. Likewise, although a public utility's customer has a property interest in the water or electricity (for example) that flows into his or her home sufficient to trigger Fourteenth Amendment procedural protections (see *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978)), that interest is simply too intangible to be subject to a seizure within the meaning of the Fourth Amendment. Cf. Pet. App. A 1081. These sorts of common-sense limitations, which are readily derived from the ordinary meaning of the verb "seize," read in light of common law principles of property, go a long way to ensuring that the explosion of litigation feared by the Seventh Circuit cannot occur.

There is, in any event, something deeply disturbing about the Seventh Circuit's determination to deny Fourth Amendment protection for the Soldal family's property rights by labelling the events here as a "garden-variety commercial dispute." Pet. App. A 1076. Even without the intervention of the police in support of Terrace Properties' actions, the blatant illegality of those actions -- the brazen violation of a law doubtless adopted because the Illinois legislature realized just how disruptive of a family's life together an eviction can be -- would take this case well beyond the level of a commonplace commercial dispute. But the co-option of the state adds another dimension entirely; it means that the removal of

petitioners' home closely parallels the seizures under Writs of Assistance that were a prime target of the Framers of the Fourth Amendment.

These writs were granted to enable private citizens to conduct searches and seizures and commanded all officers of the Crown to assist in their execution. The colonists regarded the writ as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that was ever found in an English law book." *Boyd* v. *United States*, 116 U.S. 616, 624-625 (1886). "[O]ne of the most essential branches of English liberty," it was recognized, "is the freedom of one's house," in which one "is as well guarded as a prince in his castle": "This writ, if it should be declared legal, would totally annihilate this privilege." Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 Am. Crim. L. Rev. 1389, 1399 n.14 (1989) (quoting James Otis' argument in the 1761 *Writs of Assistance Case*). It is generally acknowledged that the colonists' hostility to Writs of Assistance evolved into "[t]he driving force behind the adoption of the [Fourth] Amendment." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 266 (1990). See N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 59-61 (1937). To describe the seizure in this case, which thus lies at the core of Fourth Amendment concern, as a mere "commercial dispute" not warranting the Amendment's protection is patently unjustified and historically perverse. As Judge Flaum explained, writing for five members of the court below in dissent (Pet. App. A 1087):

> This is not, as the majority alleges, an ordinary dispute between landlord and tenant, nor is it a case in which the police merely tried to "keep the peace." This is a troubling case in which the claim is that a landlord and the local police illegally teamed up to dislodge a man's home from its moorings and towed it away simply because they both found him disagreeable. I see *nothing* ordinary about this course of events.

This Court should reject the Seventh Circuit's assumption that the federal courts are incapable of analyzing the reasonableness of seizures like the one involved here. In the current procedural posture of this case, however -- on petition from a grant of summary judgment to respondents -- the ultimate reasonableness or otherwise of the seizure of the Soldals' home is not in issue in this Court. See *O'Connor* v. *Ortega*, 480 U.S. 709, 726-727 (1987). That reasonableness inquiry is a fact-specific one dependent upon all the circumstances of the case. *Id.* at 725-726; *Jacobsen*, 466 U.S. at 124; *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). This Court should therefore remand this dispute in order that the trial court may conduct the reasonableness inquiry in the first instance.

C. The Seizure Of The Soldal Family's Home Invaded Their Privacy And Liberty Interests As Well As Their Possessory Interest In Their Property.

Having held -- incorrectly -- that the Fourth Amendment does not govern seizures of property "as such," only seizures that implicate privacy or liberty interests, the court of appeals went on to decide that petitioners had no Fourth Amendment complaint under this newly-minted standard: "Mr. Soldal lost his property, but not his privacy or his liberty." Pet. App. A 1080. This erroneous view provides independent grounds for reversing the court of appeals' judgment. Respondents' egregious conduct in disconnecting the Soldals' home from basic utilities and towing it away interfered with both the family's privacy and its liberty interests.

For decades, this Court has recognized that the Fourth Amendment protects privacy not only in the sense of secrecy, but in "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). This Court has also taken special care to emphasize that Fourth Amendment privacy interests are at their strongest when they involve the home. Indeed, the sanctity of the home has always been given the "most scrupulous protection from government invasion." *Oliver*

v. *United States*, 466 U.S. 170, 178 (1984). As the Court held in *Silverman* v. *United States*, 365 U.S. 505, 511 (1961), "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." See also *Katz* v. *United States*, 389 U.S. at 361 (Harlan, J., concurring) ("a man's home is, for most purposes, a place where he expects privacy"); *Camara* v. *Municipal Court*, 387 U.S. 523, 529 (1967) ("The right of officers to thrust themselves into a home is * * * a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance"). As these cases suggest, the mere fact that police do not physically enter into a home, leaving "its interior uncompromised and unobserved" (Pet. App. A 1078), is immaterial. Here, the Soldals' Fourth Amendment privacy interests were implicated the instant that respondents brutally interfered with their right to be left undisturbed in their home. Indeed, the invasion of privacy that occurred here was as egregious as any intrusion; the Soldals had the privacy of their home taken away *entirely* -- along with the home itself. The court of appeals' decision that no privacy interests were implicated here is truly mystifying.

This case involves privacy intrusions comparable to those recognized by the Ninth Circuit in *United States* v. *Lindsey*, 877 F.2d 777, 780 (1989). In *Lindsey*, privacy was held to have been invaded when police entered a residence not to search but to "secure" it pending authorization for a search. Because no search was involved, it is clear that the Ninth Circuit's determination that privacy had been infringed did not rest on a simplistic "prying eyes" theory of privacy of the sort adopted by the Seventh Circuit in this case, but on a more sophisticated analysis based on the sanctity of the home from government interference, with its availability as a retreat and personal space. It is that use of the home as a locus of private life -- indeed, its use for any normal purpose whatever -- that was infringed in this case and that triggers Fourth Amendment scrutiny.

The court of appeals' view that respondents' actions in no way interfered with the Soldals' liberty interests is perhaps in even

more perverse disregard of precedent, for it cannot be reconciled with this Court's decision in *United States* v. *Place*. The Court held in *Place* that a 90-minute detention of an airline passenger's luggage was sufficient to effect a "seizure" because, "[p]articularly in the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." 462 U.S. at 708. How much more intrusive on liberty, then, was the state's action in this case, which deprived the Soldals not of their interest in continuing on with a travel itinerary, but in continuing their lives together in the security of their own home! Indeed, the Soldals were prevented even from entering their home. In addition, and more prosaically, the Soldals had a liberty interest recognized by Illinois law to use reasonable efforts to protect the sanctity of their home by avoiding illegal eviction; the sheriff's deputies' stated purpose in being on the scene, however, was to prevent the Soldals from exercising that freedom. Pet. App. A 1074.

The court of appeals' determination that no privacy or liberty interests were infringed when officers of the state stripped the Soldals' trailer of its utilities, awning, and skirting, then towed it to a site where it was unusable, ignores the realities of life for those who call a trailer "home." As this Court explained recently in *Yee* v. *City of Escondido*, 60 U.S.L.W. 4301, 4302 (U.S. Apr. 1, 1992), the permanence of a trailer's site is a central element of its ability to serve as a home:

> The term "mobile home" is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about one in every hundred mobile homes is ever moved. * * * A mobile home owner typically rents a plot of land, called a "pad," from the owner of a mobile home park. * * * The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways,

> porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

When a pad is lost because of the sort of illegal removal that occurred in this case, it can often be difficult for trailer owners to continue their lives in their own home on another site; many trailer owners have incomes below the poverty level and are extremely vulnerable to abuses of the sort involved here. See Bureau of Census, American Housing Survey for the United States, Table 2-12 (1989); *Lavoie* v. *Bigwood*, 457 F.2d 7, 14 (1st Cir. 1972) (mobile homes provide special "opportunity for families of modest means"). For many residents of trailers, homes are even less fungible or replaceable than for the majority of the population, and the loss of liberty and privacy that goes with the loss of a functioning trailer-home cannot be overstated.

II. THERE IS NO REQUIREMENT THAT SECTION 1983 CLAIMS BE JUDGED SOLELY UNDER THE CONSTITUTIONAL STANDARD APPROPRIATE TO THE "DOMINANT CHARACTERISTIC" OF THE CLAIM.

The court of appeals' decision also represents an unprecedented restriction on the constitutional remedies afforded by 42 U.S.C. § 1983. The court of appeals broadly held that seizures of property are cognizable only under the Due Process Clause of the Fifth and Fourteenth Amendments (or, in some cases, the Takings Clause), and that all Section 1983 claims based upon property seizures may be brought only as due process violations. The court held that Section 1983 plaintiffs cannot elect their constitutional claim -- despite the usual rule in our legal system that "[p]laintiffs are masters of their case" (*Davis* v. *A & J Electronics*, 792 F.2d 74, 76 (7th Cir. 1986)) -- but that the "dominant character of the conduct" complained of is determinative of the uniquely applicable constitutional standard. A plaintiff is to have no control over the scope of her Section 1983 claim: the facts and the Constitution together point inexorably to a particular sort of claim and an

appropriate standard for judging whether the Constitution has been violated. This holding is untenable.

The Seventh Circuit apparently believed plaintiffs should not have Section 1983 claims for Fourth Amendment violations involving seizures of property because a plaintiff would have alternative remedies for that sort of conduct -- "state remedies if they are adequate, a federal [Section 1983] remedy under the due process clause if not." Pet. App. A 1076. That reasoning is plainly illegitimate under this Court's decision in *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990). *Zinermon* established that because the Due Process Clause of the Fourteenth Amendment incorporates "many of the specific protections defined in the Bill of Rights," including the Fourth Amendment's protection against unreasonable searches and seizures, a plaintiff "may bring suit under § 1983 for state officials' violation of his righ[t] to * * * freedom from unreasonable searches and seizures." *Ibid.* The availability of alternative state remedies is irrelevant to the existence of this cause of action: "A plaintiff * * * may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common-law remedies for trespass and conversion." *Id.* at 124-125.

The Seventh Circuit's holding that Fourth Amendment claims of unreasonable seizure of property merge with and are subsumed in procedural due process claims and lose any independent identity is particularly strange in light of the careful distinction drawn in *Zinermon* between these two types of claim. *Zinermon* makes clear that Section 1983 is an appropriate vehicle to pursue both a remedy for a substantive Fourth Amendment violation, and a remedy for a procedural due process violation, which, the Court noted, typically goes not to the deprivation of a protected substantive interest, but to the method of the deprivation. 494 U.S. at 125 ("In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such interest without due process of law"). The Seventh Circuit's ruling would deny petitioners the ability to get

the denial of their Fourth Amendment rights adjudicated within the framework of Section 1983 -- and quite apart from claims relating to their procedural due process rights -- as *Zinermon* provides.

The court of appeals' decision also rests upon a misreading of *Graham* v. *Connor*. In *Graham*, the plaintiff brought a Section 1983 claim alleging violations of both the Fourth Amendment and of his *substantive* rights under the Due Process Clause of the Fourteenth Amendment, based upon allegations of excessive force in the course of an arrest. This Court recognized that "[i]n most instances" claims of excessive force during an arrest implicate the Fourth Amendment's prohibition against unreasonable seizures. 490 U.S. at 394. The Court required application in those instances of the more detailed substantive standards provided by the Fourth Amendment, rather than of the "more generalized notion of 'substantive due process.'" *Id.* at 395.

There is *nothing* in *Graham* to suggest that Section 1983 claims can only be based upon violations of the one constitutional right that appears best to encompass the "dominant characteristic" of the conduct in issue. On the contrary, the Court rejected the argument that Section 1983 itself provided a single generic standard for evaluating excessive force claims, noting that the statute "merely provides 'a method for vindicating federal rights elsewhere conferred.'" 490 U.S. at 394. That conception of Section 1983 as simply a vehicle for pursuing substantive claims drawn from the Constitution is wholly inconsistent with the Seventh Circuit's view of the statute as the source of an independent (and of course extra-textual) *limit* on the constitutional claims that it can be used to vindicate.

More important, this is not a case like *Graham*, in which the Fourth and Fourteenth Amendments offered alternative theories of recovery for precisely the same injury, as the Seventh Circuit seemed to assume. The Fourth Amendment provides redress for the seizure of the Soldals' property. The Fourteenth Amendment, on the other hand, provides redress for their arbitrary and state-assisted eviction. *Graham* cannot plausibly be construed to prohibit the Soldals from electing the former claim, merely

because they may also be able to prove the latter. Indeed, the independence of those two claims under Section 1983 is expressly acknowledged in this Court's subsequent decision in *Zinermon*. See 494 U.S. at 125.

There is simply no justification for the artificial limit on Section 1983 claims that the Seventh Circuit devised in this case -- not in the statute itself, in this Court's precedents, or in good policy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD SOLDAL, *et al.*,
Petitioners,

v.

COUNTY OF COOK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici curiae will address the following questions:

1. Whether the County police officers acted reasonably within the meaning of the Fourth Amendment during the seizure of petitioners' mobile home.

2. Whether the County police officers violated petitioners' Fourteenth Amendment right to substantive due process.

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The questions presented in this case will have a substantial impact on the scope of federal damages actions under 42 U.S.C. § 1983 for claims arising out of evictions and repossessions at which police officers are present. *Amici*

submit that even if the Fourth Amendment applies to private evictions and repossessions, respondents' actions were reasonable under the circumstances presented here.

Petitioners additionally seek to transform state law torts and procedural due process issues into substantive due process violations, thereby evading the strictures of *Parratt* v. *Taylor*, 451 U.S. 527 (1981). *Amici* believe that this case presents an important opportunity for the Court further to clarify the application of *Parratt* to random and unauthorized acts that can be remedied through adequate state postdeprivation procedures. Because this Court's decision will have a direct impact on matters of importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt respondents' statement of the case and also rely upon the factual findings of the district court and the court of appeals. *Amici* emphasize the following facts of importance to their arguments.

On September 4, 1987, the Cook County Sheriff's Police Department was contacted by the owner of Willoway Terrace, a mobile home trailer park. The park owners requested the presence of a police officer because they feared that a disturbance might occur while their employees moved a trailer. Captain Jackson assigned Lieutenant Jones and Deputy Sheriff O'Neill to "stand by and maintain the peace" during the move. District Ct. Mem. Op. at 2-3. Upon arrival at Lot 24 of Willoway Terrace, Officer O'Neill remained in his squad car while Willoway Terrace workers began preparations to move the trailer. Petitioner Edward Soldal came out of his trailer while the Willoway Terrace employees were preparing to move it and Soldal questioned them regarding their actions. After being told by the employees to ask the "sheriff deputy," Soldal approached Officer O'Neill and asked him, "What are you going to do about this?" Officer O'Neill responded that "he . . . was there to see that [I] didn't interfere with [Willoway's] workers." 923 F.2d at 1244.

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

At approximately the same time that the Willoway Terrace employees were preparing to move the trailer, Lieutenant Jones went to the Willoway Terrace office. At the office, Lieutenant Jones spoke with Margaret Hale, the manager of Willoway Terrace, who led Jones to believe that she had court approval for the eviction. Because she was unable to produce any court documentation, however, Lieutenant Jones called Captain Jackson and asked him to check the status of the lawsuit. Captain Jackson discovered that there was a case pending and that the parties were scheduled to appear in court on September 22, 1987. Lieutenant Jones then told Hale that without an eviction notice, the police could not intervene in this civil dispute. At this point, Willoway employees were already preparing to move the trailer off Lot 24. District Ct. Mem. Op. at 3.

When Soldal attempted to file a complaint for criminal trespass with Lieutenant Jones, Jones informed Soldal that Jones first needed to speak with a district attorney in order to determine whether Willoway's actions violated the law or whether the actions were a private matter between landlord and tenant. Assistant State's Attorney Dana Crowley advised Lieutenant Jones that in his opinion, the elements of criminal trespass were not present. As a result, Lieutenant Jones explained to Soldal that he could not take his complaint. *Id.* at 4.

Willoway Terrace employees moved the trailer off Lot 24. In the move, the skirting and canopy which attached the trailer to the lot were damaged. The sewer and water fixtures were also disengaged in order to move the trailer. Willoway Terrace management intended to

deposit the trailer on the shoulder of a local intersection. When Lieutenant Jones discovered this, however, he explained that it would not be permitted. As a result, the park owners made arrangements to store the trailer on private property next door. *Id.* Additionally, Lieutenant Jones made certain that the Soldal family had a place to stay. Arrangements were made for the Soldals to stay at a local motel for four nights at Willoway Terrace's expense. *Id.* at 5.

SUMMARY OF ARGUMENT

Petitioners seek to transform an eviction—a civil dispute governed by state law—into a federal constitutional case because police officers were present to maintain order while petitioners were evicted. Without invoking any state law remedies, petitioners filed a complaint under 42 U.S.C. § 1983, claiming that the respondent police officers violated petitioners' right to be free from unreasonable seizures under the Fourth Amendment and their right to substantive due process under the Fourteenth Amendment. As the court below recognized, neither theory is available to petitioners.

I.

The court of appeals correctly held that the Fourth Amendment does not apply to this case. The rationale for that holding is fully stated by both the lower court and Cook County. This brief assumes that there was a "seizure" of property within the meaning of the Fourth Amendment and presents the alternative argument that the judgment below should nonetheless be affirmed because the conduct of the police was reasonable within the meaning of the Fourth Amendment.

Section 1983 imposes liability for a Fourth Amendment seizure only if the seizure is unreasonable. While in many circumstances reasonableness requires the issuance of a warrant based upon probable cause, that standard is inapplicable when the police are present to keep the peace during evictions and self-help repossessions. In these contexts the courts should balance the "government's need for effective methods to deal with breaches of public order" against "the individual's legitimate expectations of privacy and personal security." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985). Such a balancing test gives proper weight to the public interest in keeping the peace during evictions and repossessions—common occurrences that are inherently likely to involve emotional confrontations that might otherwise result in violence. Because respondents' conduct in keeping the peace was reasonable, and did not permanently deprive petitioners of use of their property or involve any independent intrusion into their privacy, respondents should not be subject to liability under Section 1983 for any violation of petitioners' Fourth Amendment rights.

II.

The Due Process Clause does not impose liability for intentional deprivations of property as long as state law provides adequate postdeprivation procedures. Petitioners' failure to avail themselves of these remedies should result in dismissal of their substantive due process claim. The rule of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), would be significantly undermined if claimants were allowed to escape the effect of that rule merely by stating their claim in terms of "substantive," rather than procedural, due process. Indeed, under petitioners' logic, the destruction of property in *Hudson* v. *Palmer*, 468 U.S. 517 (1984), should be actionable, as a matter of substantive due process, regardless of available state remedies.

In addition, petitioners' allegations do not violate substantive due process as it has been defined by this Court. If minor damage to petitioners' mobile home during an

eviction is considered a constitutional violation that "shocks the conscience" or the deprivation of a "fundamental right," the protection of the Fourteenth Amendment will be improperly diluted. Every wrongful eviction and repossession necessarily results in some deprivation of property. Yet under petitioners' due process theory, any wrongful eviction or repossession in which police officers are present would give rise to a constitutional claim. Petitioners would have the Fourteenth Amendment become a "font of tort law," *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), a result flatly inconsistent with this Court's decisions.

ARGUMENT

I. RESPONDENTS' CONDUCT DURING THE SEIZURE WAS REASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The court of appeals held correctly that the removal of petitioners' mobile home was not a "seizure" under the Fourth Amendment. The *en banc* opinion of the Seventh Circuit and the brief of respondents fully address that issue and their reasoning need not be repeated here. Equally important, the police action in this case was reasonable. Thus, even if it is assumed that the removal of the trailer constituted a seizure under the Fourth Amendment, that seizure meets the standards of reasonableness embodied in the Fourth Amendment as it has been interpreted by this Court.

The Fourth Amendment declares that "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures shall not be violated." As the language of the Amendment makes plain, "'[s]eizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable.'" *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989).

Despite the practical importance of the question, the Court has not identified the specific standard of reasonableness which governs police protection of the peace during evictions and repossessions. It has recognized, however, that as a general matter "what is reasonable depends on the context within which a search [or seizure] takes place." *New Jersey* v. *T.L.O.*, 469 U.S. at 337. In many contexts reasonableness requires the issuance of a warrant based upon probable cause prior to a seizure. *See Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). In cases like this, however, where the warrant requirement is unworkable, the test for reasonableness balances the "government's need for effective methods to deal with breaches of public order" against "the individual's legitimate expectations of privacy and personal security." *T.L.O.*, 469 U.S. at 337.

This balancing test accords with the unusual circumstances of this case in which the facts do not fit easily into traditional Fourth Amendment categories. Private parties undertook the removal of the trailer. The Cook County sheriffs' deputies were present at Willoway Terrace for the purpose of protecting the peace and maintaining order in the midst of a potentially explosive landlord-tenant dispute. They were not conducting an investigation. The trailer was not seized as evidence of any crime, nor was it ever searched. Dist. Ct. Mem. Op. at 4-5. A private landlord-tenant dispute was assertedly transformed into a constitutional violation by the allegation of a conspiracy—assumed to be true by the court of appeals, *see* 742 F.2d at 1075—which led to a finding of state action. *Id.*[2] In other words, the Fourth Amendment

[2] Even if the Court were to hold that the Fourth Amendment applies here and that the police conduct was "unreasonable," there would remain the jurisdictional issue of whether there is "state action." Petitioners' conspiracy allegation obviously was intended to satisfy that requirement.

Amici do not concede that there was state action in this case. Indeed, for many of the reasons set forth in this brief, a special rule of "state action" may be required in private repossession or eviction cases in which the police are present to maintain the peace. Other-

claim arises only because of this attribution of a private removal to the police. Under these circumstances,-police conduct should be judged by a standard of what is reasonable conduct by officers keeping the peace in a civil dispute. Because the police conduct in keeping the peace, even as alleged by petitioners, meets the requirements of reasonableness under the Fourth Amendment, judgment was properly entered in favor of respondents on petitioners' Fourth Amendment claim.

A. The Fourth Amendment Reasonableness Standard Balances Government And Individual Interests.

At its passage, the Fourth Amendment was envisioned as a means of circumscribing the general search warrants which allowed extensive and continuous searches of citizens and their belongings. *T.L.O.*, 469 U.S. at 335 (citing *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977) and *Boyd* v. *United States*, 116 U.S. 616, 624-29 (1886)); *Brower*, 489 U.S. at 596 (citing *Boyd* v. *United States*, 116 U.S. 616, 624-25 (1886) and T. Cooley, Constitutional Limitations 301-02). Since then, the dominant focus of Fourth Amendment jurisprudence has been on such investigatory conduct by officials engaged in law enforcement.

The Court has not limited Fourth Amendment protection to the criminal context. "[I]t would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" *O'Connor* v. *Ortega*, 480 U.S. 709, 715 (1987) (citations omitted). But the Court has recognized that "[w]hat is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner*, 489 U.S. at 619 (citations omitted). Although the Fourth Amendment requires, "as a general matter, . . . a warrant issued upon probable cause, . . . neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees' Union* v. *Von Raab*, 489 U.S. 656, 665 (1989) (citations omitted).[3]

A different Fourth Amendment reasonableness standard is permitted when the warrant requirement is "unworkable," as it clearly is here. *See O'Connor*, 480 U.S. at 721-22. The Cook County sheriff's deputies arrived at the park in order to keep the peace during an eviction. They were not looking for evidence in a criminal matter. Faced with private parties engaged in a heated dispute, their objective was to prevent violence between the parties. Because the warrant requirement is inapplicable to this situation, the standard for judging respondents' conduct properly involves a balancing of the government and individual interests involved.

B. The Police Conduct Was Reasonable.

When respondents' "need for effective methods to deal with breaches of public order" is balanced against peti-

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wise, a mere conspiracy allegation will convert all such cases into triable constitutional tort claims. Courts of appeals have recognized that the state action issue in such eviction and repossession cases must be analyzed with particular concern not to sweep too broadly and thereby expose government to liability in what are essentially private disputes. *See, e.g., Howerton* v. *Gabica*, 708 F.2d 380 (9th Cir. 1983); *United States* v. *Coleman*, 628 F.2d 961 (6th Cir. 1980); *Menchaca* v. *Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980).

[3] In the administrative context, for example, the Court has acknowledged that the requirement of a warrant could interfere with, or event thwart, compliance with government regulations. *New York* v. *Burger*, 482 U.S. 691 (1987). In the public schools and in the workplace, the Court has held that school teachers and public employers would be hindered in their work if their disciplinary searches of students and employees' work areas required a warrant based on probable cause. *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985); *O'Connor* v. *Ortega*, 480 U.S. 709 (1987). In state probation proceedings, homes of probationers can be searched on less than probable cause. *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987).

tioners' "legitimate expectations of privacy and personal security," *T.L.O.*, 469 U.S. at 337, it is clear that the conduct of the police did not violate the Fourth Amendment. There is a strong public interest in keeping the peace in commonplace, potentially explosive situations such as evictions and repossessions. The State has established procedures to resolve landlord-tenant disputes and other creditor-debtor confrontations. When parties resort to self-help, the task of the police is not to adjudicate the underlying legal dispute but to prevent the eruption of violence, thereby protecting both the parties and uninvolved members of the public.[4]

It cannot be enough to create a triable issue under Section 1983 that the police were present and permitted to go forward the action that caused petitioners' home to be seized temporarily. If liability attaches in these circumstances, the police are presented with two unacceptable choices. Either the police must adjudicate the legal dispute on the spot, or they must refuse to remain present for purposes of maintaining order. The first choice is a usurpation of the judicial role, and the latter is unthinkable given the volatility of these kinds of disputes.

Thus, even when the facts are construed in a manner most favorable to petitioners, the police conduct throughout the events at the trailer park was reasonably designed to promote the peace, protect property, and not intrude

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[4] A leading authority has described as follows the role of line police officers:

> The patrolman's role is defined more by his responsibility for maintaining order than by his responsibility for enforcing the law. By "order" is meant behavior that either disturbs or threatens to disturb the public peace or that involves face-to-face conflict among two or more persons.

James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* 16 (1968), *quoted in* Thomas F. Adams, *Law Enforcement: An Introduction to the Police Role in the Criminal Justice System* 145 (1973).

into petitioners' privacy. After arriving at the scene of the dispute, the police acted to ascertain the respective positions of the parties and to keep the peace. The police never searched the trailer. The trailer did not remain in police custody. Instead, the police ensured that the trailer would be placed in a safe place. Dist. Ct. Mem. Op. at 4-5.

If the Court were to require more of the police in these circumstances, then many evictions or repossessions could give rise to allegations of constitutional violations under Section 1983. In every situation, police would have to adjudicate the legal merits of the parties' positions. The Fourth Amendment would be implicated in many everyday disputes. The civil remedies provided by the States would be undermined.

In this case the substantial public interest in the maintenance of the peace during a potentially explosive situation outweighs any legitimate expectations of security and privacy subject to Fourth Amendment protection that petitioners may assert. The government's role only marginally affected petitioners' interests in security because the park owner was going to remove the trailer in any event. The police acted to protect the trailer and to minimize the harm to the Soldals.[5] Dist. Ct. Mem. Op. at 4. Moreover, there is no allegation that the police entered petitioners' home or otherwise invaded their privacy.

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[5] The court of appeals was concerned that petitioners had been deprived of their state-created right to exercise limited force to protect their property. The presence of the police presumably deterred Soldal from taking matters into his own hands. But the state law shield for those who must act to protect their property (in the absence of police protection) should not be converted into a sword. State policy certainly does not encourage limited violence; it merely condones it. The dominant state policy remains to maintain the peace and the police properly served that interest.

Finally, there is no need for a Fourth Amendment remedy in this case. State law provides substantial rights and remedies for mobile home tenants such as petitioners, including remedies under tort law for trespass. *See, e.g., Ariola* v. *Nigro*, 156 N.E. 2d 536 (Ill. 1959). Petitioners' interests are also protected under the Illinois Forcible Entry and Detainer Act. Ill. Rev. Stat. ch. 110, para. 9-102 and 9-103 (1984). *See Buetner* v. *Krzystowczyk*, 93 N.E.2d 428, 429 (Ill. App. Ct. 1950) (tenants with actual possession of premises who were wrongfully evicted can maintain forcible entry and detainer action against landlord). Appropriate avenues thus existed for petitioners to pursue the claim which they incorrectly raise here under the Fourth Amendment.

In balancing government against individual interests in this setting of eviction by private parties, then, the balance of interests favors the government action. The police role was primarily a neutral one of keeping the peace; they acted reasonably to protect the "seized" property and they did nothing to invade petitioners' privacy. In sum, the police conduct, even if viewed as a "seizure," was reasonable within the meaning of the Fourth Amendment.

II. RESPONDENTS DID NOT VIOLATE PETITIONERS' RIGHT TO SUBSTANTIVE DUE PROCESS.

In *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), this Court held that when a State provides adequate postdeprivation process, property damage resulting from a random and unauthorized act does not present a procedural due process claim under 42 U.S.C. § 1983. *Parratt*, 451 U.S. at 544; *Hudson*, 468 U.S. at 533. Petitioners' case concerns only procedural due process issues, and as such, it should be dismissed for failure to invoke state remedies. Even if petitioners could apply substantive due process analysis to a property deprivation, however, petitioners' claim

fails to meet this Court's exacting substantive due process standards. In effect, petitioners attempt to constitutionalize a tort claim.

A. This Case Raises Only A Procedural Due Process Claim That Should Be Dismissed Under *Parratt* v. *Taylor* And *Hudson* v. *Palmer*.

Under *Parratt* v. *Taylor*, 451 U.S. 527 (1981), when a State provides adequate postdeprivation procedures, an individual suffering a loss of property due to a random and unauthorized act does not have a claim under Section 1983. *Id.* at 544. *Parratt* is premised on the principle that government cannot provide predeprivation process before its officers commit a random and unauthorized deprivation of procedural due process. See *id.* at 542-43. Thus, adequate state postdeprivation remedies are the only process the State could be expected to provide. *Id.* at 541. As long as these procedures exist, the Fourteenth Amendment is satisfied.

Three years later, in *Hudson* v. *Palmer*, this Court reaffirmed its holding in *Parratt* and expressly extended the rule in *Parratt* to intentional deprivations of property. 468 U.S. at 533. The Court emphasized that

> [t]he underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur.

Id.

Consistent with this reasoning, the court of appeals recognized that the analysis in *Parratt* retains equal validity when applied to petitioners' claim in this case. Accordingly, the court refused to permit petitioners to evade the requirements of *Parratt* v. *Taylor* merely by claiming that the damage to their trailer was a violation separate from the wrongful eviction. 923 F.2d at 1249. The

damage to petitioners' trailer cannot be analyzed separately from the wrongful eviction, and their claim for damages therefore cannot comprise a separate constitutional wrong; it is inseparable from the eviction and is subject to redress under state law.[6] Thus, petitioners have no procedural due process claim because meaningful postdeprivation remedies were available. *Parratt*, 451 U.S. at 539.[7]

Extension of petitioners' argument to its logical conclusion would impliedly overrule *Hudson*, which holds that even if property has been intentionally damaged, "in-

[6] As the court of appeals noted, 923 F.2d at 1248, under Illinois law petitioners could have sought damages in an action for trespass. *See, e.g., Ariola* v. *Nigro*, 156 N.E.2d 536 (Ill. 1959).

[7] Increasingly, plaintiffs seek to clothe procedural due process claims in the guise of substantive due process. *See, e.g., Midnight Sessions, Ltd.* v. *City of Philadelphia*, 945 F.2d 667, 682-83 (3d Cir. 1991) (plaintiff claimed that substantive due process was violated when plaintiff was arbitrarily denied a dance license), *cert. denied*, 112 S. Ct. 1668 (1992); *Santiago de Castro* v. *Morales Medina*, 943 F.2d 129, 130 (1st Cir. 1991) (plaintiff claimed that substantive due process was violated when plaintiff was fired notwithstanding her state-created property interest in her job); *Archuleta* v. *Colorado Dep't of Insts.*, 936 F.2d 483, 488-89 (10th Cir. 1991) (plaintiff claimed that substantive due process was violated when she was arbitrarily fired in deprivation of a state-created property right to continued employment); *Lum* v. *Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989) (plaintiff claimed that substantive due process was violated when he was arbitrarily discharged in violation of his state-created property right to continued employment), *cert. denied*, 493 U.S. 1057 (1990); *Spence* v. *Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (plaintiff claimed that substantive due process was violated when he was arbitrarily denied the state-created property right of an occupancy permit); *Weimer* v. *Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989) (plaintiff claimed that substantive due process was violated when plaintiff lost money as a result of the unauthorized action of a state official); *Kauth* v. *Hartford Ins. Co.*, 852 F.2d 951, 956 (7th Cir. 1988) (plaintiff claimed that substantive due process was violated when defendant sheriff seized plaintiff's property in violation of state law).

tentional deprivations do not violate [the Due Process Clause] provided, of course, that adequate state postdeprivation remedies are available." 468 U.S. at 533. The respondent in *Hudson* claimed both procedural and substantive due process violations. Brief for Respondent and Cross-Petitioner, *Hudson* v. *Palmer* at 3-4. Nonetheless, the Court in *Hudson* ruled that Hudson did not demonstrate a violation of the *procedural* requirements of the Due Process Clause. In a concurring opinion, Justice O'Connor elaborated upon the majority's due process analysis.

> The Constitution requires the government, if it deprives people of their property, to provide due process of law and to make just compensation for any takings. . . . Thus, in challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate.

468 U.S. at 539 (O'Connor, J., concurring). Petitioners' failure to challenge the adequacy of Illinois' postdeprivation remedies is thus fatal to their due process claim.

B. The Damage Alleged Did Not "Shock the Conscience," Nor Did It Deprive Petitioners Of A Fundamental Right.

The Due Process Clause of the Fourteenth Amendment not only guarantees fair procedure, it also contains a "substantive component . . . that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins* v. *City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992) (quoting *Daniels* v. *Williams*, 474 U.S. 327, 331 1986)). Because an allegation of lack of procedural due process would be satisfied by Illinois' adequate state remedies, petitioners attempt to bypass the state courts

and bring their due process claim under the auspices of substantive due process.[8]

Substantive due process requires the existence of a right "so rooted in the traditions and conscience of our

[8] This Court has left open the question of whether, in any circumstances, a deprivation of property can constitute a deprivation of substantive due process. *Regents of Univ.* v. *Ewing*, 474 U.S. 214, 222-23 (1985). The *Ewing* Court accepted the parties' invitation to assume that the interest in continued enrollment at a state university constituted a " 'constitutionally protectable property right.' " *id.* at 223 (quoting Tr. of Oral Arg. 3), and the Court held that "even if [the] assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action." *Id.*

Justice Powell, in concurrence, however, stated that he did not believe that a property interest derived from state law is entitled to substantive due process protection because "due process rights are created only by the Constitution." *Id.* at 229 (Powell, J., concurring). The fact that the state may have labeled the interest "property" did not entitle it "to join those other, far more important interests that have heretofore been accorded the protection of substantive due process." *Id.* at 230.

When confronted with substantive due process allegations, the lower courts have responded differently. *Compare Archuleta*, 936 F.2d at 489 (claim that arbitrary deprivation of government employment violated substantive due process fails when plaintiff received an adequate state postdeprivation hearing) *and Kauth*, 852 F.2d 951 (claim that wrongful attachment of property violated substantive due process fails because the deprivation of state-created property rights do not violate substantive due process unless state remedies are inadequate or there is the violation of some other substantive constitutional right) *with Midnight Sessions*, 945 F.2d at 683 (denial of a license to operate a dance hall violates substantive due process if the government actions were motivated by bias, bad faith, or improper motive) *and Spence*, 873 F.2d at 258 (denial of a building permit violates substantive due process if the property was deprived for an improper motive and the means were pretextual or arbitrary and capricious). *Cf. Lum* v. *Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989) (cataloging split in the circuits as to whether a state-created property interest in continued employment can constitute a substantive due process violation), *cert. denied*, 493 U.S. 1057 (1990).

people as to be ranked fundamental," *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934), or "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Alternatively, a claimant can invoke substantive due process if the government action in question "shocks the conscience," *Rochin* v. *California*, 342 U.S. 165, 172 (1952), or is " 'used for purposes of oppression.' " *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)). As Justice Stevens recently explained, however,

> the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive her . . . of that right.

Collins, 112 S. Ct. at 1068 (citing *Regents of Univ.* v. *Ewing*, 474 U.S. 214, 225-26 (1985)). Even if the facts alleged by petitioners are assumed to be true, petitioners are unable to demonstrate that the damage to and temporary deprivation of their trailer "shocks the conscience" or violates any fundamental right.

1. *The Damage To The Trailer Did Not "Shock The Conscience."*

Petitioners' exaggerated allegations of "wanton destruction" fail to meet this Court's exacting definition of "shocks the conscience." The phrase "shocks the conscience" requires egregious behavior on the part of the government, not mere error. Petitioners' claim fails this test. The conduct complained of does not approach the intentional invasion of bodily integrity found in

Rochin v. *California*, 342 U.S. 165 (1952). In *Rochin*, after deputies jumped upon the plaintiff and attempted to extract capsules from his mouth, they took him to a hospital and forced a tube into his stomach against his will. *Id.* at 166. The Court found these methods "too close to the rack and screw" and "bound to offend even hardened sensibilities." *Id.* at 172.

In this case, by contrast, the damage to petitioners' trailer and the temporary deprivation of its use, while unfortunate to be sure, do not approach conduct that "shocks the conscience". Even when the facts are read in the light most favorable to the petitioners, they fall far short of demonstrating that respondents engaged in "wanton destruction" (Pet. Br. 49) of the Soldals' trailer. On the contrary, it is undisputed that respondents ensured that the trailer would be safely stored on private property adjacent to Willoway Terrace rather than on the shoulder of a local intersection, as the park owners' management had planned. District Court Mem. Op. at 4. Moreover, respondents made sure that the Soldals would immediately be provided with accommodation at Willoway Terrace's expense. *Id.* at 5. In short, respondents' conduct during the eviction was not even arguably the sort of egregious government abuse of power that shocks the conscience and therefore violates a citizen's right to substantive due process.

2. *The Damage To The Trailer And Temporary Deprivation Of Its Use Did Not Deprive Petitioners Of A Fundamental Right.*

Even if it is assumed that the damage was intentional, there is no right "implicit in the concept of ordered liberty," *Palko*, 302 U.S. at 325, to be safe from intentional property damage, even damage done to a mobile home in a civil dispute. Petitioners can point to no authority to support their assertion to the contrary. As Justice Scalia stated in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989) (plurality opinion):

> Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.'

Id. at 121 (quoting *Moore* v. *East Cleveland*, 431 U.S. 494, 502 (1977)). Nor should the fact "[t]hat the Court has ample precedent for the creation of new constitutional rights . . . lead it to repeat the process at will." *Id.* at 122 (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)). This Court would have to expand the heretofore narrow category of "fundamental rights" to an unprecedented extent in order to bring petitioners' claim within its scope.

Under petitioners' expansive theory of substantive due process, routine evictions and repossessions in which police officers are present to maintain the peace would give rise to fundamental rights governed by federal constitutional law. As this Court has stated, however, "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986). This Court has repeatedly rejected attempts to transform Section 1983 into a "font of tort law." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). This case requires the Court once again to refuse to withdraw matters of essentially local concern from the exclusive ambit of state law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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